INDEX.

CITATIONS.

In the Supreme Court
OF THE
United States

October Term, 1916

No. 452

The United States of America, Interstate Commerce Commission, Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Denver & Rio Grande Railroad Company, Southern Pacific Company, Union Pacific Railroad Company and Western Pacific Railroad Company,

Appellants,

vs.

Merchants' and Manufacturers' Traffic Association of Sacramento, Traffic Bureau of San Jose Chamber of Commerce, Stockton Traffic Bureau and City of Santa Clara,

Respondents.

BRIEF FOR RESPONDENTS.

The Facts.

Description of Respondents.

Respondents herein, petitioners in the lower court, other than the City of Santa Clara, were and

are duly organized associations with memberships composed of the principal merchants, mercantile firms, manufacturing concerns, wholesale companies, jobbers, business men and dealers in their respective communities. The members of said associations, as well as the associations themselves, have directly suffered irreparable loss and injury by reason of the aforesaid orders of the Interstate Commerce Commission and of the tariffs filed by the rail carriers pursuant thereto.

The City of Santa Clara is a duly organized and existing body politic, with all the rights and privileges of such an organization, and has suffered like loss and injury.

Irreparable Damage Suffered by Respondents.

Prior to the institution of the suit in the court below, the rail carriers. because of competition with water carriers, had reduced the rates on east-bound and west-bound trans-continental freight destined to Sacramento, Stockton, San Jose and Santa Clara and had established them as terminal points, with the same rates on freight to and from the East as were charged to and from San Francisco and Oakland. These four cities are and have been manufacturing and jobbing communities, producing and selling articles of commerce in competition with San Francisco and Oakland. Manufacturers and dealers in the four cities first named come into active competition with those in a like line of trade located at San Francisco and Oakland and com-

pete with them for business in intervening territory.

Prior to the orders of the Commission herein complained of and the tariffs filed pursuant thereto, these four cities had enjoyed equal rates with San Francisco and Oakland, had built up large and flourishing industries by reason thereof and were able to compete in common territory. The reason for the enjoyment of such equal rates was because the four cities received the benefit directly of water competition by reason of transportation from San Francisco by bay craft and river boats and the absorption by the water carriers of the local haul.

Increase of Rates.

The tariff filed by the rail carriers pursuant to the orders of the Commission, Supplement 16 to T. C. F. B. W. B. Tariff 1-N, covered two classes of commodity freight designated as Schedule "B" and Schedule "C" commodities.

As to Schedule "B" commodities, the rates were increased to the full extent of the back haul charge from San Francisco to the four cities involved herein, the rates to San Francisco not having been lowered.

As to Schedule "C" commodities, the rates were, to an extent, lowered to San Francisco and Oakland but were increased to the four cities involved herein to the extent of seventy-five per cent of the back haul charge from San Francisco, thus, in many

instances, imposing a higher rate to these four cities than had theretofore been charged, although the rate to San Francisco and Oakland had been lowered in some instances.

The attention of the court is respectfully called to Supplement 16 to West-Bound Tariff No. 1-N, Circular 16-J and Supplement No. 1 thereto, filed by the rail carriers pursuant to the aforesaid orders of the Commission. These tariffs show the increase in freight charges to the four cities. As before stated, these four points had always been "terminals" and had received the advantage of the same rates as had San Francisco. In Supplement 16, above referred to, we will point out the following pages showing the changes:

In Supplement 16 above mentioned, the following is shown—on page 156, Sacramento is designated by two stars (* *); on page 157, San Jose and Santa Clara, and on page 158, Stockton, are likewise designated. The same note describing the effect of these two stars follows at the bottom of each of said pages and is as follows:

> "* * * Effective July 15, 1915, 'Intermediate' rates named in Section 2-a (see pages 195 to 239, inclusive, of this supplement), will apply under authority of Interstate Commerce Commission Fourth Section Order No. 124 of date April 30, 1915, as amended by order of date June 5, 1915. (A) Effective August 15, 1915, 'Terminal' rates authorized in Sections 2 and 4 of tariff (and as supplemented) will be cancelled; 'Intermediate' rates will thereafter

apply, see T. C. F. B. Circular 16-J. (A)—'Advance'."

Commodities mentioned in Section 2-a of Supplement 16—pages 195 to 239, inclusive,—are Schedule "C" commodities.

Commodities mentioned in Section 2 of Supplement 16—pages 182 to 194, inclusive—are Schedule "B" commodities.

With reference to commodities shown in Section 2 of Supplement 16, being Schedule "B" commodities, we will call the attention of the court to the top of each page where it shows the rates from eastern points to cities in the West taking terminal rates, and to other cities in the West taking intermediate rates.

Points taking terminal rates have the following heading:

> "To points shown on pages 25 to 54, inclusive, of tariff, (or as supplemented), as taking terminal rates."

As to intermediate points the heading reads:

> "To points shown on pages 25 to 54, inclusive, of tariff, (or as supplemented), as taking intermediate rates."

Following it will be seen that the character "A" is shown in most instances, and at the bottom of the page the character "A" is shown to mean "Advance".

In the original tariff 1-N, Sacramento, Stockton, San Jose and Santa Clara were shown as terminals.

Supplement 16 to Tariff No. 1-N, provided, as shown by the heading, that the points taking intermediate rates had been supplemented. Pages 156, 157 and 158 above mentioned, show that this Supplement 16 to Tariff No. 1-N, has wiped out Sacramento, Stockton, San Jose and Santa Clara as "terminal" points and has placed them in the list of "intermediate" points, they to take intermediate rates as to Schedule "C" commodities beginning July 15, 1915, and as to Schedule "B" commodities, August 15, 1915. (See note before referred to.)

The order of June 5, 1915, mentioned in the note, was merely an order granting the carriers the right to file their tariff schedules on less than statutory notice.

Supplement 16 to Tariff No. 1-N, Section 2-a thereof, pages 195 to 239 of Tariff), covers Schedule "C" commodities. It will be seen from the heading on all of those pages that the rates are divided into "Terminal Rates" and "Intermediate Rates", Supplement 16, as before shown, having placed the four cities in the list of "intermediates".

Circular 16-J connected with Supplement 16 before mentioned, contains a list of "intermediate" points and Sacramento, San Jose, Santa Clara and Stockton are listed as such "intermediate" points on pages 27, 28 and 29 of said circular. In this Circular No. 16-J, as shown by the (*) note, these four cities are intermediates as to west-bound traffic only, but in Supplement No. 1 to said Circular

No. 16-J, page 4 thereof, they are made "intermediate" points as to all traffic, both east and westbound.

Effect of Increase of Rates.

Going north from Sacramento, San Francisco enjoys the same rate as does Sacramento at the Oregon State Line and north thereof, gradually increasing south, but at Woodland with a differential in favor of Sacramento of 12¢ only. Going eastward, Sacramento enjoys a differential over San Francisco based upon a 12¢ scale, but which diminishes across the State of Nevada and with the same rates to Tonopah and Goldfield territories. Going south through the San Joaquin Valley the rates are the same from San Francisco and Sacramento to all points.

The rates from Stockton and San Francisco are the same at the Nevada State line, likewise the same a short distance north of Sacramento and south they are the same at about Bakersfield.

San Jose and Santa Clara have no advantage over San Francisco to the South at Santa Cruz or Paso Robles.

In the territory between any of the four cities mentioned and San Francisco, the merchants of the latter city can land goods in such territory from San Francisco at approximately the same rate as can the dealers from the other places mentioned.

Thus the situation results that if merchants of San Francisco receive goods from the East at a cheaper rate than the merchants of the four complaining cities, they can undersell those of the latter places and thus drive them out of business. The jobbers of Sacramento pay practically the same freight charges for goods received direct from the East as are paid by San Francisco jobbers for goods sent through to San Francisco and then re-shipped back to Sacramento. In territory outside of Sacramento, the dealer located in San Francisco has all the advantage, as for instance, down the San Joaquin Valley, at Tonopah or Goldfield, Nevada, and at the Oregon State Line, the dealer in San Francisco can ship to the consumer at the same freight charge as can the merchant of Sacramento who pays much more in freight charges for his goods received.

Sacramento is merely an illustration, the same situation applies even more forcibly at the other three cities. The jobbers and manufacturers of these places who have built up large industries under equal rates cannot compete with those located at the more favored points under the orders of the Commission, and the result is that such industries are ruined.

The situation of Sacramento, Stockton, San Jose and Santa Clara, their physical surroundings, right to terminal rates by reason of water competition, and the irreparable damage which they will suffer by reason of the increase in freight rates are most

fully shown in the affidavits filed in the lower court and which are a part of the record, having been made such especially by the order of the lower court. (See Trans., pp. 382-383.) Attached to these affidavits are Schedules showing the increases. The attention of the court is most respectfully called to these affidavits and to the exhibits attached to them.

For affidavit of Messrs. Bradley, Semple and Wall, showing the situation collectively,—(see Trans., pp. 24-32 inclusive); for affidavit of G. J. Bradley, showing the situation at Sacramento,—(see Trans., pp. 33-45 inclusive); for affidavit of S. E. Semple, showing the situation at Stockton,—(see Trans., pp. 46-50 inclusive); for affidavit of W. D. Wall, showing the situation at San Jose and Santa Clara,—(see Trans., pp. 51-55 inclusive).

None of the allegations set forth in these affidavits were disputed or denied. The motion for preliminary injunction and the hearing for final injunction were heard upon these affidavits, including the exhibits.

HISTORY OF THE CASE.

A brief history of the case, as shown by the record on appeal, is perhaps necessary to fully explain the two orders of the Interstate Commerce Commission complained of.

The Fourth Section applications involved in this appeal (see Trans., pp. 391-400 inclusive) were the direct result of the decision by the Interstate Commerce Commission in what is comomnly known as the *Intermountain Case.* The first decision is reported in 19 I. C. C. Rep., 238. (See Trans., pp. 96-114, inclusive.)

Petition by Railroad Commission of Nevada.

The Fourth Section of the Act to Regulate Commerce was amended June 18, 1910, in regard to the "long-and-short-haul" clause. It was prior to this date that the Railroad Commission of Nevada petitioned the Interstate Commerce Commission that Nevada points, known generally as *Intermountain points,* be charged no higher rate for west-bound trans-continental freight than was charged to *Pacific Coast terminals.* Prior to said application all Intermountain points had been charged much higher rates on both classes of west-bound freight, viz: freight designated as *class goods* and freight designated as *commodities,* than had been charged for the carriage of like freight to the *Pacific Coast terminals.* Sacramento, Stockton, San Jose and Santa Clara, as well as numerous other points in California, had long prior to such time been designated as *Pacific Coast terminals,* and were such at the time of the application by the Railroad Commission of Nevada. All terminals paid the same rate on west-bound and east-bound trans-contin-

ental freight, the rate being much less than that charged to *Intermountain points.*

The relief prayed for in the application of the Railroad Commission of Nevada was that Nevada points be given the same rates as were extended to *Pacific Coast terminals.* The prayer of this application is set forth in the findings and conclusions handed down by Commissioner Lane June 6, 1910, and is part of the record. The application was as follows:

> "Nevada asks that she be given rates as low as those given to Sacramento." (See Trans., p. 112.)
>
> "The theory upon which the case was presented eliminated all other considerations excepting the claim that all rates extended to Sacramento were reasonable as to Reno and other Nevada points." (See Trans., p. 113.)

The decision of the Interstate Commerce Commission then follows (see Trans. pp. 112, 113), and sets forth the *class rates* to be charged to Nevada points. The only point at issue was whether or not Nevada territory should be charged the same rate as that charged to Pacific Coast terminals. The Pacific Coast terminals on one hand, including Sacramento, Stockton, San Jose and Santa Clara, were considered collectively and as a whole as distinguished from Nevada or Intermountain points; no question was raised as to either the propriety or the advisability of the aforesaid terminals or as to whether or not any of such terminals had been improperly so designated. The decision of the Commission in fact recognized the various

"terminals" as having been properly designated as such and considered them as a whole as distinguished from Intermountain points.

The decision of the Commission makes the following comparisons:

> The rates to Reno as a Nevada point are compared to those to Sacramento, a terminal. (See Trans., p. 96.)
>
> Sacramento and San Francisco are jointly referred to as terminals as distinguished from Nevada points. (See Trans., p. 97.)
>
> The point at issue is set forth as follows:
>
> "The State of Nevada, through its railroad commission, now comes asking that Nevada points be given the same rates as are now given to Pacific Coast terminals." (See Trans., p. 97.)
>
> The original complaint of Nevada was that the Interstate Commerce Commission "should adjudge the rates to Sacramento to be reasonable as applied to intermediate points". (See Trans., p. 97.)
>
> When additional eastern carriers were brought in as defendants before the Interstate Commerce Commission the sole petition of Nevada was that the rates charged to such points should not exceed those at that time applicable on shipments to the more distant coast terminals. (See Trans., p. 97.)

The decision of the Commission upon the application in behalf of Nevada points considered the rates charged on both *class goods* and *commodities*. The method of computing rates to Intermountain points which had existed prior to that time had been based on a combination over Sacramento. (See Trans., pp. 98-101, inclusive.)

The decision says as follows:

> "The most prominent coast terminals are Seattle, Tacoma, Portland, *Sacramento, San Jose, Stockton,* Oakland, San Francisco, Los Angeles and San Diego." (See Trans., p. 98. Italics ours.)

The situation is further explained in the decision, viz:

> "As we have seen, the rates are higher on almost all commodities from eastern producing points to Reno than on the same commodities to *Sacramento,* the more distant point." (See Trans., p. 107. Italics ours.)

Water Competition Recognized.

The decision also deals with the question of *water competition at Sacramento and other coast terminals.* The water competition and the fact that the four complaining cities were California Terminals because of such water competition, are accepted as proper and the terminal rate situation and the propriety thereof is fully recognized. Sacramento as a coast terminal is several times mentioned. The decision itself shows that Sacramento is as much entitled to terminal rates by reason of water competition as is San Francisco. (See Trans., pp. 110, 111, 112.)

It will be noted all through the decision that the propriety of Sacramento, Stockton, San Jose and Santa Clara as terminal points is never questioned, and that all terminals are considered as a single entity, the rates to Intermountain points being

based on the nearest terminal, which was Sacramento. (See Trans., pp. 107-111, inclusive.)

First Decision of Commission Affected Only Class Rates.

The decision of the Interstate Commerce Commission concluded by fixing rates on *class goods,* but specifically stated as follows: "There is no foundation in the record in this case for the establishment of such commodity rates." (See Trans., p. 113.) The Commission therefore made no order as to commodity rates but directed the complainant—Railroad Commission of Nevada—to furnish the Commission and the rail carriers with a list of commodities regarding which rates were desired, and the matter went over for further hearing. (See Trans., p. 114.)

Commodity Rates Only Are Involved in Case at Bar.

The decision of the Commission above mentioned, handed down June 6, 1910, fixed the rates on *class* goods. They are now blanketed all over the State of California, from Colfax westward and therefore are not involved, since Sacramento, Stockton, San Jose and Santa Clara, being west of Colfax, take the Colfax rate which is the same as that charged to San Francisco and Oakland.

On June 18, 1910, twelve days after the foregoing decision, Congress amended the Fourth Section of the Act to Regulate Commerce.

Petitions by Carriers Under Fourth Section.

Prior to the aforesaid amendment, the construction of the Fourth Section of the Act had been

that the rail carriers primarily could decide what constituted "under substantially similar circumstances and conditions," and thus determine for themselves as to when they could or could not violate the provisions of the long-and-short-haul clause. This amendment, as before stated, was passed twelve days after the decision by the Interstate Commerce Commission as to *class* rates but before any determination had been made as to *commodity rates.* Following the amendment the rail carriers petitioned the Commission to be relieved from the provisions of the long-and-short-haul clause *and to continue the then present method of rate making* so that higher rates could be charged to Intermountain points than were charged to Pacific Coast terminals. These applications were Nos. 205, 342, 343, 344, 349, 350 and 352. (See Trans., pp. 391-400, inclusive.)

CARRIERS DID NOT PETITION TO CHANGE RATES.

These applications, Nos. 205, etc., were filed with the tariffs theretofore in force and which tariffs were a part of the applications. These tariffs show Sacramento, Stockton, San Jose and Santa Clara as *Pacific Coast terminals,* and show that the rates then in effect to the four cities mentioned were the same as the rates to San Francisco and Oakland and were higher than the rates to Intermountain territory, the rates to the last-named points being based on Sacramento as a terminal.

Particular attention is called to the wording of the applications. The carriers petitioned to *continue the then present method of making rates,* and asked that the rates theretofore in effect should be sanctioned by the Commission. The reasons given were *competition by water at the California terminals.*

Some of the applications referred to dealt only with freight to and from points outside of Nevada and California, and have no bearing whatsoever upon the present issues. In all cases, however, as will be further shown by the tariffs filed by the carriers in connection with the applications, the petition was that the rates formerly existing be sanctioned by the Commission. These applications were filed under the amended Fourth Section of the Act, which provided that greater charges should not be imposed for a lesser than for a greater haul, the shorter being included in the longer, but provided further, however, that no tariffs then lawfully existing were required, as stated in the Act, "to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, *nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.*"

It was under this provision sanctioning a continuance of the tariffs that the applications by the carriers were filed.

TARIFFS PETITIONED TO BE CONTINUED IN FORCE DESIGNATED SACRAMENTO, STOCKTON, SAN JOSE AND SANTA CLARA AS "TERMINALS" THE SAME AS SAN FRANCISCO.

An inspection of the tariffs filed with the foregoing applications, whenever pertinent, shows as follows:

1. Sacramento, Stockton, San Jose and Santa Clara were designated as California terminals, and the rates applicable to these four cities were in all instances the same as the rates charged to San Francisco and Oakland.

2. Neither the applications nor the tariffs sought to make any change in the terminal rate situation or in the list of terminals.

3. The rail carriers sought to continue in effect the rates which had been operative prior to the amendment of June 18, 1910, which rates were the same to Sacramento, Stockton, San Jose and Santa Clara as to San Francisco and Oakland, and lower to the four cities first mentioned than to Intermountain points.

The tariffs filed as aforesaid in many instances have no bearing upon any traffic originating in or destined to any point in California or Nevada, such as those tariffs which quoted only rates to or from points in Oregon, Washington, North Pacific Coast Terminals, British Columbia Pacific Coast Terminals or "through joint water and rail rates" from the east via Vancouver, B. C., to points in the Orient and foreign countries. The rates covered by each tariff are designated on the outside cover thereof.

We will quote such designations from these tariffs, giving the trans-continental freight bureau number, showing the traffic involved.

Tariff 1-L, in applications Nos. 205 and 352.

> "Westbound tariff No. 1-L naming local and joint rates governed by local joint and proportional commodity rates from eastern shipping points designated on pages 2 to 10 inclusive to California Terminals designated on page 11 and other points in California, Nevada and Utah, as provided on page 12."

On page 11 of the said tariff appears the heading "California Terminals". In the list of said terminals appear the following cities: "Sacramento," "San Jose," "Santa Clara," "Stockton".

On page 12 of said tariff appears the list of "Intermediate" points, the names of the four cities mentioned not appearing. No change by supplement.

Tariff 4-H, in applications Nos. 205, 343 and 352:

> "Westbound Tariff No. 4-H naming local and joint class rates and local joint and proportional commodity rates from eastern shipping points to North Pacific Coast Terminals and points in Oregon and Washington and also to British Columbia Pacific Coast Terminals and other points in British Columbia."

An inspection of the tariff, and its supplements will show that no rates on traffic either to or from any California or Nevada points were involved.

Circular 16-F, in applications Nos. 205, 349 and 352:

> "List of 'Intermediate' Pacific Coast points in California, Oregon and Nevada, showing roads on which located, and nearest Terminal thereto."

The list of "Intermediate" points in this circular does not include Sacramento, Stockton, San Jose or Santa Clara, but in naming the "Terminals" nearest to such intermediate points, these four cities appear as such terminals. For instance, on line 3, page 11, opposite the "Intermediate station—Acampo", appears as the "Nearest terminal—Stockton". On page 11, opposite the "Intermediate station—Agnew" appears as the "Nearest terminal—San Jose". Opposite the "Intermediate station—Alta" appears as the "Nearest terminal—Sacramento", opposite the "Intermediate station—Centerville" appears as the "Nearest terminal—Santa Clara". These four cities are classed as terminals in every instance. There was no change in the supplement.

Tariff S. R. 1001, in application 342:

> "Joint proportional tariff naming proportional class rates and proportional commodity rates from points in the United States designated on page 1 of tariff to Vancouver, B. C., on traffic destined to and consigned through to foreign destinations (or beyond), to which through rates are herein provided in connection with Canadian Pacific Ry., Minn., St. Paul & Sault Ste. Marie Ry. and participating carriers named on page 1 of tariff and also

through class rates and through commodity rates to Australia, Fiji Islands, New Zealand, or beyond."

The above tariff refers only to through traffic from the East by northern routes destined to foreign points via Vancouver, B. C. No traffic to or from California or Nevada points was involved. The supplement made no change except that additional points in the Orient were mentioned.

Tariff S. R. No. 1003, in application No. 342:

Practically the same as Tariff S. R. 1001, preceding, and applied only to through shipments to foreign ports from the East via Vancouver, B. C.

Tariff S. R. No. 1002, in application No. 344:

"Westbound tariff naming proportional commodity rates from ship-side, New Orleans, La., Galveston, Texas City, Tex., and traffic originating in foreign countries to California Terminals as designated on page 1."

On page 1 of said tariff, under the heading "California Terminals" appear as such terminals "Sacramento", San Jose", Santa Clara", "Stockton". No change by supplement.

Tariff No. 2-H, in application No. 349:

"Eastbound tariff No. 2-H naming local and joint class rates and local, joint and proportional commodity rates from North Pacific Coast Terminals and points in Oregon, Washington and Idaho and points in the United States and Canada."

An inspection of said tariff and supplement thereto will show that traffic from or to California or Nevada points was not involved.

Tariff No. 3-I, in application No. 349:

> "Eastbound tariff No. 3-I naming local and joint class rates and local joint and proportional commodity rates from California Terminals designated on page 1, and interior points in California, Nevada and Utah."

On page 1 of said tariff appears the heading "California Terminals" and thereunder are named as such terminals, "Sacramento", "Stockton", "San Jose", "Santa Clara". On page 2 of said tariff appears the list of "Intermediate Points", and these four cities are not so designated.

Tariff 7-C, in application No. 349:

> "Eastbound tariff No. 7-C naming joint class rates and joint commodity rates from points in California, Nevada and Utah designated on pages 1 to 4 inclusive, and points in Minnesota, North Dakota, South Dakota and Manitoba."

On pages 3 and 4 of said tariff, under the heading "California Terminals", appear the following cities: "Sacramento", "Stockton", "San Jose", "Santa Clara". The supplements made no change.

Tariff 9-C, in application No. 349:

> "Eastbound tariff No. 9-C naming local and joint class rates and local joint and proportional commodity rates from North Pacific Coast Terminals and points in Oregon, Washington, Idaho and British Columbia to points in Minnesota, North Dakota and South Dakota."

Under said tariff, no traffic to or from California or Nevada points was involved. No change by the supplement.

Tariff 10-C, in applications Nos. 349 and 350:

> "Eastbound and westbound tariff No. 10-C naming joint class rates and joint commodity rates between points in Minnesota, North Dakota, South Dakota and Manitoba and San Francisco and Oakland, Cal., in connection with Pacific Coast Steamship Co., Alaska Pacific Steamship Co., E. V. Rideout Co."

This tariff covered only joint water and rail rates moving through San Francisco and Oakland between the Northwest and points reached by steamer, and had no bearing on the terminal rate situation or on rates to or from points in California or Nevada.

Tariff 6-D, in application No. 350:

> "Westbound tariff No. 6-D naming commodity rates from southeastern common points to Pacific Coast Terminals in California, Oregon, and Washington designated on pages 16 and 17, and points in Oregon and Washington, also to British Columbia Pacific Coast Terminals."

On page 17 of said tariff under the heading "Pacific Coast Terminals" appear the following cities: "Sacramento", "Stockton", San Jose" and "Santa Clara". No change by supplement.

Tariff S. R. 1004, in application No. 349:

> "Eastbound special tariff naming joint rates on lumber, shingles, and other articles from all

points on" (then appear the names of some 33 railroads, none of which operate in California) "in Oregon, Washington, Idaho, Montana, Alberta and British Columbia."

None of the traffic covered by said tariff or supplement involved either California or Nevada points.

Tariff 5-F, in application No. 350:

"Competitive local and joint tariff naming class and commodity rates from points in Eastern Canada to North Pacific Coast Terminals, and points in Oregon and Washington, also British Columbia Pacific Coast Terminals."

This tariff did not involve any charges on traffic either to or from points in California or Nevada. No change by supplement.

Tariff 8-D, in application No. 350:

"Westbound tariff No. 8-D naming local and joint class rates and local and joint commodity rates from points in Minnesota, North Dakota and South Dakota to North Pacific Coast Terminals, and points in Oregon and Washington and British Columbia Pacific Coast Terminals."

This tariff did not involve any charges on traffic either to or from points in California or Nevada. No change by supplement.

Tariff 11-C, in application No. 350:

"Westbound tariff No. 11-C naming joint class rates and joint commodity rates from points in Minnesota, North Dakota and South

Dakota, to points in California, Nevada and Utah designated on pages 5, 6 and 7."

On page 6 of said tariff, under the heading "California Terminals" appear "Sacramento", "Stockton", "San Jose", "Santa Clara". On page 7 of said tariff is given the list of "Intermediate" points and the four cities mentioned are not listed thereunder. No change by supplement.

Tariff S. R. 998, in application No. 349:

"Eastbound special tariff naming local joint and proportional commodity rates on lumber, shingles and other articles from points in California, Nevada, Oregon and Utah designated on pages 1 to 5 inclusive, to points in the United States and Canada."

On page 3 of said tariff we find mentioned "Sacramento" and "San Jose", on page 4, "Santa Clara" and "Stockton", which cities take the same rates as San Francisco and all other California Terminals.

Decision of Commission Which Was Basis of Fourth Section Order No. 124.

The aforesaid applications Nos. 205, etc., were heard and determined at one time, the findings and conclusions of the Interstate Commerce Commission being handed down June 22, 1911. In so far as they affected the rates to Intermountain points as distinguished from California terminals, they are reported in 21 I. C. C. Rep. 329, and are set forth in full in the record. (See Trans., pp. 125-181, inclusive.) This decision was the basis of

Fourth Section Order No. 124 which is set forth in the record. (See Trans., pp. 116-118, inclusive.) Commodity rates only were involved, and the order referred to *intermediate points* as distinguished from *Pacific Coast terminals,* Sacramento, Stockton, San Jose and Santa Clara being such terminal points. The first portion of the order reads as follows:

> "These applications" (applications Nos. 205, etc.) "as above numbered, on behalf of the transcontinental freight bureau, ask for authority to *continue rates* from eastern points of shipment which are higher to intermediate *points* in Canada and in the states of Arizona, New Mexico, Idaho, California, Montana, Nevada, Oregon, Utah, and Washington, and other states east thereof, than to *Pacific Coast terminals.*" (See Trans., p. 116. Italics ours.)

It will be noted that the order of the Commission does not attempt in any wise to change the terminal rate situation, such point not being involved in any of the applications. In fact, the only point at issue was as to the extent that the Fourth Section of the Act to Regulate Commerce could be violated in charging higher rates to *Intermountain points* than were charged to the *terminal points,* all cities enjoying terminal rates being considered and treated as rightfully entitled thereto.

The point at issue is shown by the decision of the Commission set forth in the record as follows:

> "The contention of Nevada had been that under all provisions of the Act to Regulate Commerce the rates extended by the railroads

to the *Pacific Coast terminal cities, such as Sacramento* and San Francisco, should be granted to Nevada. By reference to the previous report" (19 I. C. C. Rep. 238, see Trans., pp. 96-114 inclus.) "it will be seen how insistent was the claim that to charge any higher rate to Nevada points than was given to *Sacramento* was a violation of the Fourth Section of the Act prohibiting lower rates at the more distant point; that there was no such water competition at these coast terminals as justified the preferential rates given to them; that the rates to the coast were in fact reasonably and not abnormally low; that this was recognized by the carriers in making their divisions east of Ogden in that they accepted upon business destined to points in Nevada the same divisions upon transcontinental traffic as when destined to the coast terminals; and that whatever shadow of water competition remained which was potent in reducing the rate below a fully normal standard of reasonableness was more than offset by the shorter haul to the interior points, making the coast rate a reasonable one for the shorter haul to this Intermountain country." (See Trans., p. 127.)

In the decision the Pacific Coast Terminals as a whole are considered and San Jose is recognized as such a terminal. (See Trans., pp. 139, 140.)

The concluding part of the decision which was the basis of the original Fourth Section Order No. 124 shows conclusively that the terminal rate situation as then existing was considered proper and that Fourth Section Order No. 124, following said decision, did not intend or even contemplate any addition to nor diminution of the number of cities in California which were receiving terminal

rates. We will quote from the decision (See Trans., pp. 165, 166):

"We desire to be extremely conservative in this the first application of the new law, and to require an adjustment of rates that will be safely within the zone of our discretion. For this reason we have decided that the transcontinental carriers serving Reno and other points upon the main line of the Central Pacific shall make no higher charge upon any article carrying a commodity rate than is contemporaneously in effect from Missouri River points, such as Omaha and Kansas City, to coast terminal points. This principle we shall also expect to be applied on commodity rates to all main-line intermediate points in Nevada and California. Traffic originating at Chicago and in Chicago territory moving under commodity rates may have a rate seven (7) per cent higher than that imposed on freight originating in Chicago and Chicago territory and destined to the *coast terminals.* From Buffalo-Pittsburg territory the rates to intermediate points may rise above those demanded and charged from the same points and territory to the *coast terminals* to the extent of fifteen (15) per cent, while from New York and trunk line territory the rates charged shall not exceed twenty-five (25) per cent over and above *terminal rates.* This means that Suisun, Auburn, Truckee, Reno, and Elko, for instance, points intermediate to San Francisco from the east, shall have at least the benefit of the commodity rates extended from the Missouri River *to Sacramento and San Francisco,* and shall pay no more than seven (7) per cent above the Chicago-coast terminal rates, and corresponding increases of fifteen (15) and twenty-five (25) per cent, respectively, from Pittsburg and New York territories.

"Some of the petitions under the fourth section which have been considered are made by carriers reaching *California terminals* through the southern gateways, southern Nevada and Arizona. These applications are also denied in so far as they involve the imposition of higher rates upon intermediate points than are applied on commodities from the Missouri River to Los Angeles, San Francisco, or other coast terminals. To all such intermediate points (Ashfork, Maricopa, San Bernardino, Bakersfield, Fresno, and Ventura, for instance) terminal rates shall not be exceeded as from Missouri River points, with the same proportionate advances east of the Missouri River as heretofore specified."

Fourth Section Order No. 124, hereinbefore quoted from, shows that the question at issue was the charging of higher rates to interior points than to *Pacific Coast Terminals,* which included Sacramento, Stockton, San Jose and Santa Clara.

The four cities, respondents herein, have, at all times since said order, been recognized as Pacific Coast Terminals, and the subsequent appeals and litigation relative to said order did not consider nor contemplate a change in the then existing terminal rate situation.

The rail carriers were dissatisfied with said Fourth Section Order No. 124 and appealed therefrom, their contention being that said fourth section as amended was unconstitutional. The appeal was taken to the Commerce Court, thereafter to the Supreme Court of the United States and the

order of the Interstate Commerce Commission, viz, Fourth Section Order No. 124, was sustained.

The decision on the foregoing appeal, known as the Intermountain Rate Cases, is reported in

234 U. S. 476.

The Supreme Court held that the right of determination which had theretofore primarily vested in the carrier, was by the amendment of 1910 transferred to the Interstate Commerce Commission. *The right, however, to make rates was not lodged in the Commission, such right is lodged only in the carrier.* The purpose of the amendment was that if the carrier, the rate making power, desired to violate the long-and-short-haul clause, which was made absolute except for the proviso inserted, it could make *application* to the Commission, and *after application* the common carrier could in *special cases, after investigation,* be authorized by the Commission to charge more for a lesser than for a longer haul over the same route. This decision was handed down by the Supreme Court June 22, 1914.

Points Decided by Commission and Supreme Court.

It will be remembered that the carriers applied to the Commission for authority to continue rates theretofore existing, their contention being that the rate situation should not be disturbed, that the "Terminal points" in California were entitled to the rates which they had formerly enjoyed and that the "Intermountain points" should be charged

the terminal rate plus an additional charge for the back haul, the right to such difference being because of competition at the terminals. The issue was "California Terminals" collectively on the one hand, as distinguished from "Intermountain points" on the other. The Commission recognized the validity of the carriers' claim, accepted the terminal rate situation as it then existed, and prescribed the extent to which the carriers might be relieved from the operation of the fourth section. So far as the Interstate Commerce Commission was concerned, the matter was then ended. The cause was carried to the Supreme Court of the United States and the sole issue was the constitutionality of the amendment to the fourth section. The Supreme Court decided in favor of the amendment. There was then nothing further to be done except for the carriers to obey Fourth Section Order No. 124 which gave them the right to charge on freight destined from the East to Intermountain points an amount exceeding the charge to California terminals by 7, 15 and 25 per cent, according to the point of origin.

APPLICATION FOR MODIFICATION OF FOURTH SECTION ORDER NO. 124.

The time was very limited within which the carriers could file new tariffs. They therefore petitioned the Commission to extend the effective date of Fourth Section Order No. 124, stating that they would fully conform with the order except

that they requested a modification as to certain commodities which they designated as Schedule "C" commodities. This application was filed July 9, 1914, and is set forth in full in the record. (See Trans., pp. 235-237, inclusive.)

Particular attention is called to this application since it shows the extent of the relief prayed for, which was the jurisdictional matter before the Interstate Commerce Commission. In their application the carriers divided commodities into three classes, or, as they designated them, schedules. They were as follows:

> *Schedule "A".* Commodities which were principally the products of the soil and as to which the rates to Pacific Coast terminals would apply as the maximum to all intermediate points and *regarding which no relief was requested.* (See Trans., p. 235. Italics ours.)
>
> *Schedule "B".* Commodities which were alleged to be subject, at the Pacific Coast terminals, to competition of the water carriers, but upon which the rates to Pacific Coast terminals by rail were more than $2.00 per 100 lbs. in less than carloads, and $1.00 per 100 lbs. in carloads, and *regarding which the carriers asked for no relief.* (See Trans., pp. 235, 236. Italics ours.)
>
> *Schedule "C".* This list covered generally manufactured commodities for the transportation of which the rail carriers were subject to severe competition at Pacific Coast terminals of carriers by sea and upon which the rates were less than those on Schedule "B" commodities, or, as alleged by the carriers, the rates were sub-normal to a marked degree, and were necessary in order that the rail car-

> riers could move their share of this sea competitive traffic, also to enable manufacturers and shippers at points of production not located directly upon the Atlantic seaboard to share in the trade of the Pacific Coast. (See Trans., p. 236.)

A reading of the application mentioned will show that the rail carriers applied only for additional relief under Fourth Section Order No. 124 as to "Intermountain points" as distinguished from the "Coast terminals", and this only as to Schedule "C" commodities. The application was to amend Fourth Section Order No. 124 which dealt only with rates to the Intermountain territory. (See Trans., pp. 236-237.)

As to Schedule "A" and Schedule "B" commodities, the application of the carriers specifically said that no relief was requested.

A hearing pursuant to this application began October 6, 1914. None of the respondents in this case nor any merchants, manufacturers or shippers of the four cities involved were served with any notice of hearing. The only matter before the Commission was as to the amount of relief which should be granted as to Schedule "C" commodities. No change in the terminal rate situation was requested.

In the affidavits filed in the lower court and which are a part of the record herein, and in our petition as well, we have shown that no evidence was given before the Interstate Commerce Commission at the hearing in October, 1914, under the

above application, which would warrant any change in the Pacific Coast terminal situation or justify an increase of rates to and from the four cities herein involved. We submit that these facts are uncontroverted.

Order of January 29, 1915, Dealt Only With Intermountain Points.

Pursuant to the aforesaid hearing the Commission handed down its order of January 29, 1915, based upon its findings and conclusions of the same date. The decision and order are both set forth in the record. (For the decision, see Trans., pp. 275-322, inclusive; for the order of January 29, 1915, see Trans., pp. 323-327, inclusive.)

The order of January 29, 1915, dealt only with *rates to Intermountain points.* The Commission in its decision of that date, for the first time designated a strip of territory lying between the Pacific Ocean and the Sierra Nevada Mountains as "back haul territory", distinguishing the same from "Intermountain territory". Rates were not fixed by the order of January 29, 1915, as to back haul points and in that connection the Commission says:

> "The record in this case is not sufficient to afford a basis warranting the Commission in prescribing the exact measure of these rates. We shall, therefore, make no order in regard thereto at this time."
>
> "No evidence has been presented in this case to show that it is necessary to apply the coast terminal rates to any points except the ports of call on the Pacific Coast at which the Atlantic-Pacific steamship lines deliver freight.

We shall also authorize the maintenance of higher rates as hereinbefore outlined to the Intermountain points. We shall expect the carriers within sixty days from the date of service hereof to submit to the Commission such plan for adjustment of rates to the back haul points as they may desire. Should the carriers submit no such plan within this time, the Commission will undertake such investigation as to these rates as will enable it to enter a proper order with regard thereto." (See Trans., p. 298.)

Second Petition of Carriers Was to Maintain Terminal Rate Situation.

Following the suggestion to the rail carriers in the decision rendered January 29, 1915, the carriers on March 23, 1915, submitted their plan for the fixing of rates to back haul territory, the petition reading as follows:

"The lines reaching to California terminals have submitted the following plan for making rate from eastern defined territory to such points:

"Deduct from terminal commodity rates 7 cents per 100 lbs., carloads, and 10 cents per 100 lbs., l. c. l., for basing rates, to which add full local rates from nearest terminal point to destination. This basis to prevail eastward from the terminal point until point is reached where the direct rate is the same or less. In no case shall rate to any back haul point be less than to the terminal point." (See Trans., p. 50 and p. 340.)

The aforesaid plan and none other was submitted to the Commission and after argument, but without the taking of any evidence, the Commission

rendered its further decision of April 30, 1915, reported in 34 I. C. C. Rep., p. 13. (See Trans., pp. 339-346, inclusive.) This was followed by amended Fourth Section Order No. 124 of the same date. (See Trans., pp. 347-351, inclusive.)

The application of the carriers was in effect a request that the terminal rate situation be not changed. This is recognized by the Commission, for in its findings and conclusions of April 30, 1915, it says:

> "The plan for constructing rates to back-haul points proposed by the lines leading to the California terminals would create a zone contiguous to the terminals to which terminal rates would apply. The extent of this zone would be limited by the distances to which local rates of 7¢, carloads, and 10¢, less than carloads, would reach. *It would, however, in substance include all of the points that have heretofore been accorded terminal rates.*" (See Trans., begin. bot. p. 341. Italics ours.)

Arbitrary Order of the Commission.

The plan proposed by the carriers, being the only one considered, was rejected and the Commission adopted a new scheme without the taking of evidence or without there having been any application for that particular purpose. The situation in this respect is admitted by the answer of the Interstate Commerce Commission, wherein it is not denied that the order of April 30, 1915, was granted without having been applied for and without the taking of evidence, but by inference the Commission claims it had generally investigated the problem for many

years. (See Trans., p. 82.) The record, however, conclusively shows that this particular matter had not been investigated, therefore the order of April 30, 1915, was an arbitrary exercise of power on the part of the Commission and was made regardless of the fact that it was unjustly discriminatory as to the four cities involved in this matter.

The first three lines of the report of the Commission of April 30, 1915, show that only Schedule "C" commodity rates were involved, it being distinctly so stated (see Trans., p. 340), nevertheless the order of the Commission of that same date, amended Fourth Section Order No. 124, covered rates on Schedule "B" commodities to the back haul points, the order of the Commission reading as follows:

> "It is further ordered, that the petitioners herein be, and they are hereby, authorized to establish and maintain commodity rates from all points in zones 2, 3 and 4, as above defined, to points intermediate to Pacific Coast terminals, that are higher to intermediate points than to Pacific Coast terminals, provided that on and after July 15, 1915, except as hereinafter specified, the rates to intermediate points from points in zones 2, 3 and 4 shall not exceed the rates on the same commodities from the same points of origin to the Pacific Coast terminals by more than 7 per cent. from points in zone 2, 15 per cent from points in zone 3, and 25 per cent. from

The above portion of the order deals with Schedule "B" commodities regarding which there

points in zone 4." (See Trans., p. 349.)

had been no application for a change in rates. The original applications specifically stated that no change was desired as to the rates on Schedule "B" commodities.

The order of the Commission, however, went further regarding less-than-carload commodity rates and increased the amount to 25, 40, and 55 cents per hundred pounds according to the point of origin. The order of the Commission is as follows:

> "It is further ordered, that petitioners herein be, and they are hereby, authorized to establish the less-than-carload commodity rates proposed in their application for additional relief, as shown in said appendix, from points in zones 2, 3, and 4 to Pacific Coast terminals, and to continue higher rates to intermediate points, provided that on and after July 15, 1915, the rates to intermediate points do not exceed the rates from the Missouri River to the same destinations by more than 25, 40, and 55 cents per 100 pounds from points in zones 2, 3, and 4, respectively." (See Trans., pp. 350-351.)

The effect of the above provisions of the order of the Commission was to make a sudden and further increase in transcontinental rates to Sacramento, Stockton, San Jose and Santa Clara for which no application had been filed and regarding which no hearing had been had. It was an arbitrary exercise of rate making power by the Commission.

The order of the Commission then refers to Schedule "C" commodities, the order reading:

"It is further ordered, that, except as hereinbefore specified, petitioners herein be, and they are hereby, authorized to construct rates upon the commodities listed under Schedule "C", named in said report of January 29, 1915, from eastern defined territories to points intermediate to Pacific Coast ports, by taking the full terminal rates and adding thereto arbitraries varying with distance from the nearest port not exceeding 75 per cent of the local rate from the nearest port to each destination, provided that in no case shall the rates constructed as above described exceed the maximum rates to Intermountain points hereinbefore prescribed." (See Trans., p. 351.)

The Commission further ordered that in the observance of this order as to rates on Schedule "C" commodities, the California terminals should consist only of San Diego, Wilmington, East Wilmington, San Pedro, East San Pedro, San Francisco and Oakland. (See Trans., p. 351.)

The order of January 29, 1915, referred only to Schedule "C" commodities, the first sentence of said order specifically so stating. (See Trans., p. 323.) The order of April 30, 1915, however, has increased the trans-continental rates to and from Sacramento, Stockton, San Jose and Santa Clara, as to Schedule "B" commodities, by the percentages or the amounts above mentioned, according to the point of origin.

Tariffs Increased All Rates to the Four Cities.

Following the aforesaid order of April 30, 1915, the rail carriers filed the tariffs which were directly

complained of, namely, Supplement 16 to Trans-Continental Freight Bureau West Bound Tariff No. 1-N, I. C. C. No. 996 of R. H. Countiss, Circular No. 16-J, and Supplement No. 1 thereto. These tariffs are a part of the record and specially made so by order of the lower court. (See Trans., p. 389.) These tariffs show that the rates to Sacramento, Stockton, San Jose and Santa Clara were increased as to Schedule "B" commodities according to the provisions of the order as above set forth, the rates on Schedule "B" commodities to San Francisco and Oakland not being changed. As to Schedule "C" commodities the rates to said four cities were increased to the extent that in addition to the full terminal rate to San Francisco they must pay three-quarters of the local back haul charge from said terminal.

Protest to Commission Against Increase of Rates Disallowed.

Following the filing of the tariffs aforesaid, respondents herein filed protests with the Interstate Commerce Commission against the increase in rates as to both Schedule "B" and Schedule "C" commodities, especially as to Schedule "B" commodities which had not been considered, on the grounds that such increases were unreasonable, unjust and discriminatory, had been allowed without application therefor having been made and without evidence having been introduced to justify the same, that Sacramento, Stockton, San Jose and Santa Clara had been extended terminal rates by reason of water competition and that

freight charges to said cities had been reduced by reason of such competition and that no changed conditions having arisen such increase in rates as to Schedule "B" and as to Schedule "C" commodities were contrary to provisions of the Act to Regulate Commerce. A rehearing and investigation of the matter was demanded. The protests and petitions were denied by the Commission. These facts are especially set forth in the amendment to the petition originally filed in the lower court. (See Trans., pp. 20-23, inclusive.) These allegations are admitted in the answer of the Interstate Commerce Commission (See Trans., pp. 81, 82), except wherein it argues that the representatives of the four cities should have taken other steps. As to the facts of the case, the joint affidavit of Messrs. Bradley, Semple and Wall (see Trans., pp. 24-32, inclusive); the affidavit of G. J. Bradley (pp. 33-45, inclusive); the affidavit of S. E. Semple (pp. 46-50, inclusive), and the affidavit of W. D. Wall (pp. 51-55, inclusive), all fully substantiate the allegations set forth both in the petition and in the amendment to the petition filed in the District Court on behalf of the complainants therein. These affidavits are a part of the record, the cause having been submitted to the lower court upon the petition and amendment to the petition, the affidavits filed on behalf of petitioners in the lower court, being the affidavits just mentioned, and upon the exhibits filed at the time of the hearing of the application for a temporary injunction, also upon the exhibits

filed at the time of the hearing for final injunction. (See Trans., p. 382.) The affidavits above mentioned were directed by the lower court to be made a part of the transcript of record on appeal. (See Trans., bottom of page 382.) The allegations contained in these affidavits were neither denied nor disputed.

Points and Authorities.

Petitioners in the lower court sought a relief directly given them by statute. The orders of the Commission of January 29, 1915, and April 30, 1915, and the tariffs filed by the rail carriers thereunder, had a twofold effect, first, to increase the freight rates to and from Sacramento, Stockton, San Jose and Santa Clara, and second, to take the four cities named out of the list of "California Terminals" and to classify them as "Intermediates". Not only was the increase in freight rates unjustified, but the depriving of the four points mentioned of the benefit of terminal rates was unreasonable, unjust and discriminatory against them and in favor of San Francisco and Oakland.

We contend that the orders of the Commission and the tariffs filed by the carriers pursuant thereto are unlawful for the following reason, viz: said orders were beyond the statutory power of the Commission and for the following reasons:

(a) The orders of the Commission directed the carriers to file certain tariffs for which no applica-

tion had been made and regarding which no evidence had been taken.

(b) That said orders and tariffs were unjust, unreasonable and discriminatory as to the four cities involved.

(c) Respondents herein, by reason of said orders and tariffs, were deprived of property without due process of law.

(d) That the increase in rates was contrary to the provisions of the last paragraph of the fourth section of the Act to Regulate Commerce.

(e) That respondents herein, by reason of the above matters, suffered great and irreparable injury.

Appellants herein, at the hearing in the lower court, took a mistaken view of the nature of the relief prayed for. The District Court was not requested to make an affirmative order granting to the petitioners therein a new right, but was asked to suspend the orders of the Commission in so far as they were unlawful.

STATUTE GIVES RIGHT TO RELIEF PRAYED FOR.

The Commerce Court was created by the Act of June 18, 1910 (36 Stat. L. 539), which Act was thereafter incorporated into the Judicial Code, Act of March 3, 1911, Ch. 231, 36 Stat. L. 1087-1169.

Thereafter the Commerce Court was abolished, but the jurisdiction and procedure of the Commerce Court as it existed before its abolition, were by said act vested in the District Courts of the United States. The Act abolishing the Commerce Court was approved October 22, 1913 (36 Stat. L. 219), the same having been incorporated in the Deficiencies Appropriation Act of October 22, 1913, Ch. 32, 230.

The various District Courts of the United States have the same jurisdiction which formerly vested in the Commerce Court. The act creating the Commerce Court, however, did not deprive the courts of the United States generally of any powers which they formerly exercised, but rather delegated such powers to designated courts and especially enumerated certain of the same.

For the sake of convenience we will refer to the Judicial Code and the sections thereof. *Judicial Code,* section 207, which outlined the jurisdiction of the Commerce Court, thereafter transferred to the District Courts, grants jurisdiction, among other things, in the following matters:

> "Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

Section 208 of the Judicial Code says:

> "Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the Commerce Court against the United States. The pend-

> ency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the Commerce Court, in its discretion, may restrain or suspend, in whole or in part, the operation of the Commission's order pending the final hearing and determination of the suit."

The Act of October 22, 1913, in abolishing the Commerce Court and transferring the jurisdiction to the District Courts, also says:

> "The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission, shall be in the Judicial District. * * * "

PETITIONERS BELOW WERE ENTITLED TO SUE.

Appellants have made the claim that the petitioners below had no right of action. On the argument when application was made for the injunction, they admitted that the City of Santa Clara, a body politic, might sue, but asserted that the commercial bodies could not.

Localities, Bodies Politic and Associations.

All of the petitioners in the lower court were authorized by statute to institute the proceeding which they did for an injunction. Three of the petitioners are commercial organizations and traffic associations formed for the purpose of representing jobbers, merchants and manufacturers located at Sacramento, Stockton, San Jose and Santa

Clara, in all traffic matters in which the members of the association might be interested. The merchants, manufacturers and jobbers of these cities are members of these associations and are directly interested in all freight regulations. The City of Santa Clara, the other petitioner in the court below, is a municipal corporation or body politic and represents the interests of the citizens of that community.

The Act to Regulate Commerce provides that bodies are authorized to apply for relief to the Interstate Commerce Commission in various matters and become parties to such proceedings. Their right to represent others is directly granted. Section 13 of the Act to Regulate Commerce (Act February 4, 1887, 24 Stats. L. 379) contains this provision:

> "That any *person, firm, corporation, company,* or *association,* or any *mercantile, agricultural,* or *manufacturing society* or *other organization,* or any *body politic* or *municipal organization,* or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts * * *." (Italics ours.)

The foregoing conclusively shows that the Act to Regulate Commerce provides for the protection, as to rail rates, of persons, companies, firms, corporations, localities, associations, mercantile, agricultural, or manufacturing societies or other organizations, bodies politic and municipal organi-

zations. The Act to Regulate Commerce gives them the right to complain to the Commission, and provides that the Commission must protect them by a suspension of the tariffs or practices, and a hearing. This the Commission did not do.

Section 13 further provides:

> "No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Section 3 of the Act to Regulate Commerce (24 Stats. L. 379) reads in part as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular *person, company, firm, corporation or locality,* or any particular description of traffic, in any respect whatsoever, or to subject any particular *person, company, firm, corporation, or locality,* or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (Italics ours).

Section 2 of the Act to Further Regulate Commerce with Foreign Nations and Among the States (Act Feb. 19, 1903, 32 Stat. pt. 1, p. 847), says:

> "That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any Circuit Court of the United States, it shall be lawful to include as parties, in addition to the carrier, all persons interested in or affected by the rate, regulation, or practice under consid-

> eration, and inquiries, investigations, orders and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same provisions as are or shall be authorized by law with respect to carriers."

These statutes conclusively show that persons, companies, firms, corporations, localities, associations, mercantile, agricultural or manufacturing societies or other organizations, bodies politic and municipal organizations have the right to complain against any unjust traffic regulation or other act of the carriers which may affect their interests, and that in the settlement of any controversy all interested parties should be brought before the Commission or before the Court, as the case may be.

Judicial Code, Section 212, in part reads as follows, as to matters which had theretofore transpired before the Interstate Commerce Commission and which have been brought thereafter before the courts of the United States:

> "Provided that the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and

speed the determination of such suits. Provided, further, *that communities, associations, corporations, firms,* and *individuals who are interested in the controversy or question* before the Interstate Commerce Commission, or in any suit which may be brought by any one under the provisions of this chapter, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors *may prosecute, defend, or continue said suit* or proceeding unaffected by the action or non-action of the Attorney General therein." (Italics ours.)

We submit that the Act to Regulate Commerce and the acts of Congress relative to judicial proceedings to review the orders of the Interstate Commerce Commission, contemplate the right to bring suit on behalf of association, localities, or bodies politic.

The argument of appellants is that although associations, organizations and the like may complain to the Commission under Sections 13 and 15 of the Act to Regulate Commerce, and although the laws of the United States specifically give such complainants the right of action before the federal courts to set aside or enjoin orders of the Commission, yet should the Commission illegally and contrary to the Constitution of the United States deny relief, or even ignore the complaint, the complainants would be

compelled to abide by such action and would have no redress. This would make the Commission an arbitrary rate-making body superior to all law or rules of justice.

Class Suits.

Under the general principles pertaining in equity, representatives of a class or unincorporated associations may bring bils in behalf of others similarly situated.

Foster on Federal Practice, 5th edition, volume 1, section 113, at the bottom of page 418, says:

> "It has been held that a city and county sufficiently represents gas consumers within their territory as to justify, in a suit in which the former are made parties defendant, an injunction against the latter, although not formally joined."
>
> Citing S. F. Gas & El. Co. v. City and County of San Francisco, 164 Fed. 884, 887.

Section 114 of Foster's Federal Practice, 5th edition, volume 1, says:

> "When a number of persons have a common interest in a thing which is the subject of litigation, and, in some instances, when a number of persons have a common interest in a question which is before the court for decision, one or more may sue or be sued in behalf of the rest. Judge Story divides the first of these divisions into two: '(1) When the question is one of a common and general interest, and one or more sue or defend for the benefit of the whole; and (2) when the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to

represent the rights and interests of the whole. But there seem to be no reason for treating the two classes separately." * * *

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

See also Section 116, Foster's Federal Practice, 5th edition, volume 1.

Section 127 of the same work says:

"The rules upon the subject of parties are, however, very loose, and the questions arising under them are decided largely in the discretion of the court. 'The necessity for the relaxation of the rule is more especially apparent in the courts of the United States, where, oftentimes, the enforcement of the rule would oust them of their jurisdiction, and deprive parties entitled to the interposition of a court of equity of any remedy whatever." (Citing Payne v. Hook, 7 Wall. 425, 432.)

The rules of this court are to the same effect.

Equity Rule 37 says as follows:

"Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or *a party expressly authorized by statute*, may sue in his own name without joining with him the party for whose benefit the action is brought."

Equity Rule 38 is as follows:

"Representatives of class: "When the question is one of common or general interest to

many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

AFFIDAVITS A PART OF THE RECORD.

Appellants herein, defendants in the court below, objected to the affidavits filed in connection with the petition for injunction. Objection might as well have been made to the petition as to the affidavits for it is necessary, when applying to any court of the United States for an injunction, to show the facts which will justify the court in granting relief. Proper rules of pleading, as we understand them, are to the effect that a petition or bill of complaint should set forth the ultimate facts, not evidenciary matter. The proper sphere of affidavits, in connection with an application for an injunction, is to set forth specifically the evidence of the ultimate facts contained in the petition. It is not the introduction of new matter or of the bringing in of new evidence; the affidavits are used to show to the court the precise facts of the case. The rules of this court require that the evidence warranting an injunction must be set forth either by *verified bill* or by *affivadit.* In the absence of an affidavit the verified bill is used as such.

Equity Rule 73 reads as follows:

"No preliminary injunction shall be granted without notice to the opposite party. Nor shall any temporary restraining order be granted

> without notice to the opposite party, unless it shall clearly appear from specific facts, *shown by affidavit or by verified bill,* that immediate and irreparable loss or damage will result to the applicant before the matter can be heard on notice." (Italics ours.)

Foster on Federal Practice, 5th edition, volume 1, sections 292 and 293, relative to applications for interlocutory injunctions, refers to the use of affidavits in such connection as a settled fact.

Section 334 of the above work says:

> "An affidavit is a declaration upon oath or affirmation before some person having competent and lawful power and authority to administer the same. Affidavits are used in a suit in equity in three ways. In certain cases they must be annexed to a bill before it can be properly filed; certain documents may be proved by them at the hearing; *and they are used in support of interlocutory applications."* (Italics ours.)

Defendants in the lower court, appellants here, made technical objections to the consideration of the affidavits, relying on the authority of the case of Louisville & Nashville R. R. Co. v. United States, 238 U. S. 1. This is referred to for the purpose of more clearly outlining our position. The case just mentioned was an appeal by the rail carriers from an order denying an interlocutory injunction. The matter of certain rates for the transportation of coal had been investigated by the Interstate Commerce Commission in a matter wherein the Louisville & Nashville Railroad Company and other car-

riers were parties and in which proceeding the Commission had found that certain rates were discriminatory. The carriers applied to the federal court for an injunction, which was denied; they then appealed to the Supreme Court. All matters relative to rates on coal and as to discrimination had been heard by the Commission. In the District Court the carriers sought to introduce additional evidence by affidavit and the only point decided by the Supreme Court was that such affidavit was not material under the contention of the rail carriers for the reason that they did not claim that the evidence did not sustain the findings of the Commission, but only claimed that the findings did not sustain the order. This is entirely different from the case at bar wherein the affidavits were introduced to show in detail the evidence sustaining the allegations of the petition as amended, filed in the lower court.

The point at issue in this case is that the Interstate Commerce Commission handed down orders which had not been applied for, and without the taking of evidence, in so far as Sacramento, Stockton, San Jose and Santa Clara were concerned; that the physical and industrial features of said communities were not considered; and that although the rates to the four cities mentioned had theretofore been reduced by reason of water competition, they were raised by order of the Commission without application, hearing or investigation and without changed conditions having taken place.

The respondents herein, petitioners below, were not parties to the hearing before the Interstate Commerce Commission and had no notice thereof. In fact, even had notice been given, the matters presented to the Commission did not affect their rights since the rates to said cities were not involved. A suit where an application for an injunction to restrain an order of the Commission is made upon the ground that the findings of the Commission are not supported by evidence in a matter directly applied for and to which the complainant was a party, presents an entirely different case from the one at bar. In this matter we demanded of the Interstate Commerce Commission a rehearing of the orders involved and the right to be heard and to submit evidence. We also protested against the tariffs filed by the rail carriers which increased the rates to the four cities. These protests and demands were denied. We were not parties to the proceedings before the Commission and were denied the right of a rehearing or the privilege of introducing evidence. It is of the lack of evidence that we complain—lack of evidence and lack of the right to produce evidence. If a party has his day in court and then appeals, a different situation might be presented. We, however, never had our day in court in so far as the Commission was concerned. These facts we have shown by our petition as amended and our affidavits.

Right to Hearing Denied by the Commission.

In the lower court the defendants, appellants here, argued that we were seeking an affirmative order.

Such, however, was incorrect; we sought only the suspension of the orders of the Commission in so far as the Commission exceeded its statutory authority and acted contrary to the Constitution of the United States.

At the hearing in the court below, appellants herein cited cases and quoted from decisions at length regarding matters which have no application. For instance, they relied on the case of Proctor & Gamble v. U. S., 225 U. S. 282. That case laid down the principle, where a party had sought to have the Commission make an affirmative order granting him something which he had not theretofore enjoyed, that after the Interstate Commerce Commission had denied such party the privilege demanded, he could not apply to the courts to compel the awarding of the relief. The case merely held that the courts would not award some privilege which the Interstate Commerce Commission had refused. We most heartily agree with the principle laid down in the above case, but it has no application. We did not seek in this action to have the court award us an affirmative right denied by the Commission, but sought only to set aside in part the orders of the Commission which unlawfully took away from us certain rights to which we were justly entitled.

Sections 13 and 15 of the Act to Regulate Commerce have no application. The claim was made that we should have applied to the Commission for relief. We did apply to the Commission and the

fact cannot be denied. In the amendment to our petition, and in our affidavits as well, we specifically alleged that we applied to the Interstate Commerce Commission for relief as to the orders in question, and that the Commission denied us the right of a hearing. This fact is admitted.

We protested against the tariffs filed by the rail carriers and demanded, under the provisions of the Act to Regulate Commerce, that said tariffs be investigated and that the rail carriers be called upon to justify the increase of rates to the four complaining cities. Our protest and demand were ignored and denied.

Appellants further relied upon the case of Texas & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, and similar cases, claiming that we had no right to appeal to the courts without first having made an application to the Commission. As before shown, we did apply to the Interstate Commerce Commission. But appellants have mistaken the issue in this case, for it was not against the rail carriers that our charge was primarily aimed, but at the orders of the Commission. In addition to the statutes before cited, Section 15 of the Act to Regulate Commerce says that orders of the Commission may be set aside by courts of competent jurisdiction. The Abilene case is good law but has no application. In that matter the rail carrier was sued for the recovery of money under the claim that the railroad had unreasonably exacted from the Abilene Company certain money on shipments of cotton seed,

the company claiming that the freight charges were unreasonable. This court merely said that the proper procedure was first to have the question as to the unreasonableness of the rates determined by the Commission. In the Abilene case there was no question raised as to the validity of any order of the Commission or as to the validity of the rates except that they were unreasonable. As we will hereafter show, the rail carriers primarily make rates, the Commission merely adjudging as to the reasonableness, discrimination or preference. As to the long-and-short-haul clause of the fourth section, the Act is mandatory except that it may be violated only when and in the manner prescribed by the statute.

The position taken by appellants is erroneous for two reasons, first—we did protest, complain and petition the Commission, everything that could have been done under Sections 13 and 15 of the Act, and second—the sections of the act just named do not cover the case at bar.

SECTIONS 13 AND 15 OF ACT NOT APPLICABLE.

Section 13 of the Act to Regulate Commerce contemplates only complaints for some act done or omitted to be done by a common carrier contrary to law. If the carriers impose unjust, unreasonable or discriminatory rates or restrictions upon certain persons or localities to their prejudice and disadvantage, they may complain to the Commission to have the evils corrected. The section comprehends acts

on the part of carriers which are unlawful under sections 1, 2 and 3 of the Act. Section 13 does not contemplate that a party should complain to the Commission of an act done by the Commission itself, for the statute and the laws of the United States give a party in such an instance the right to appeal to the courts to enjoin, set aside or cancel, in whole or in part, any orders of the Commission which are not in accord with law.

Section 13 further provides that the Interstate Commerce Commission may institute an inquiry *on its own motion* regarding matters referred to in Section 13, which contemplates unlawful acts on the part of the carriers. The statute then provides that the Commission must follow the same line of procedure as if a complaint had been made.

Section 15 of the Act provides for a *full hearing* as a jurisdictional necessity before any order of the Commission can be made. Section 15 begins as follows:

> "That whenever, *after full hearing,* upon a complaint made as provided in Section 13 of this Act, or *after full hearing under an order for investigation* and hearing by the Commission on its own initiative, * * * " (Italics ours.)

An *order for a hearing* is required by the statute as well as the hearing. No order for such a hearing was made by the Commission of its own motion and no hearing without an order, was had. The statute does not contemplate that the Commission may simply make up its mind that it will change certain rates

and then justify them by saying that it had mentally considered the same. Such procedure would be depriving parties of property without due process of law.

A comparison of sections 13 and 15 of the Act to Regulate Commerce, with section 4 thereof, will readily show that the two former named sections have reference to complaints regarding acts on the part of common carriers wherein such common carriers have done or omitted to do something in contravention of the Act, such as where the carriers have imposed rates which are unjust, unreasonable, discriminatory, preferential or prejudicial. Sections 13 and 15 contemplate some act on the part of a common carrier initiated by itself. Section 4 of the Act commands that the rail carriers shall not charge more for a shorter haul than for a longer haul where the lesser is included within the greater except *upon application, in special cases, after investigation,* the carrier may be authorized by the Commission to violate this long-and-short-haul clause. Unless there has been the *application, investigation,* and the finding that a *special case* exists, the mandate of the statute prohibits any violation of its terms.

That portion of Section 4 of the Act reads:

> "Provided, however, that *upon application* to the Interstate Commerce Commission such common carrier may in *special cases, after investigation,* be authorized by the Commission to charge less for the longer than for shorter distances for the transportation of passengers or property; and the Commission may from

time to time prescribe the extent to which such designated carrier may be relieved from the operation of this section." (Italics ours.)

The last portion of this proviso does not mean that the Commission may voluntarily, without application or hearing, make orders allowing carriers to violate provisions of the fourth section, but only that after there has been an application by a designated common carrier, and after investigation where a special case has been shown to exist, the Commission may make its order in that special case; and the matter therefore being before the Commission, it may thereafter modify the particular order. The Commission, however, has no rate making authority and its right to modify its orders can only be exercised after a hearing, with notice to all interested parties. To hold otherwise would be to say that the Commission might make any order which it deemed proper, without notice or hearing of any kind.

Distinction Between Cases Arising Under Secs. 2 and 3, and Under Sec. 4.

The second and third sections of the Act to Regulate Commerce deal with *unjust discrimination and undue or unreasonable preference or advantage.* Such things, from their very nature, are comparative. They arise by reason of Acts initiated by the carriers. It is the correction of such Acts that is contemplated in sections 13 and 15. If the carriers are collecting unreasonable rates or indulging in discriminatory practices, the Commission may, *after*

full hearing, upon complaint or *motion and order for a hearing,* correct the evil. Whether a certain rate is unreasonable or prejudicial or not presents a question of fact for determination by the Commission, and if after proper procedure and a full hearing the Commission makes an order based upon evidence its decree will not be set aside by the courts. There must, however, be evidence to sustain the order.

This is the argument of appellants, and the substance of all the decisions they have cited. We do not claim in such instances the courts will review the facts or consider the matter prior to a determination by the Commission. All cases cited by appellants, however, deal only with matters arising under sections 2 and 3 of the Act.

Section 4 of the Act is different. *It contains an absolute prohibition against charging more for a shorter than for a longer haul, the former being included in the latter,* subject to modification only in the manner specified. The provisions of section 4 are mandatory, those of sections 2 and 3 are comparative and require the determination of facts which will show the existence of the matters complained of.

United States v. Louisville & N. R. Co., 235 U. S. 314,

shows the distinction between the sections mentioned. In that case the Commission made an order under sections 2 and 3. The Supreme Court said

there should have been an application, hearing and order under section 4. At pages 326, 327, Chief Justice White says:

> "It is true that in argument it was said that the question here is whether there was a preference or discrimination under the 2d and 3d sections of the act, and not an inquiry under the 4th section, and that a distinction between the various sections has been recognized. It has, indeed, been held that the provisions of the 2d, 3d, and 4th sections of the act, being *in pari materia,* required harmonious construction, and therefore they should not be applied so that one section destroyed the others, and consequently that a lesser charge for a longer than for a shorter distance permitted by the 4th section could not, for such reason, be held to be either a preference or discrimination under the 2d or 3d sections. Louisville & N. R. Co. v. Behlmer, 175 U. S. 648; East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1. But the rule which requires that a practice which is permitted by one section should not be prohibited upon the theory that it is forbidden by another gives no support to the unwarranted assumption that that may be permitted which is devoid of all sanction, and indeed is in direct conflict with all three of the sections,—a result clearly arising in the case before us in consequence of the amendment of § 4. Indeed, when the evil which it may be assumed conduced to the adoption of the amendment of the 4th section and the remedy which that amendment was intended to make effective are taken into view, it would seem that the case before us cogently demonstrates the applicability of the amendment to the situation."

We might well say that the orders of the Commission herein complained of are in conflict with all of said three sections.

The Commission may determine in the manner above stated whether or not certain rates are unreasonable or prejudicial under sections 2 and 3. Section 4 of the Act is *prohibitive* and *mandatory,* and allows but two exceptions, one referring to new cases arising after the amendment of June 18, 1910, where carriers may be granted the right to charge more for the shorter than for the longer haul *upon order of the Commission after application to and investigation by the Commission and the showing and finding that a special case exists;* the other to cases where tariffs violating this provision of the Act were lawfully in effect prior to the amendment of June 18, 1910, regarding which the fourth section, as amended, provides:

> "That no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission."

The rail carriers, after the passage of the above amendment, applied to the Commission for permission to continue *to charge the then existing rates* which were higher to *Intermountain points* than to the *California terminals, but which were not higher*

to Sacramento, Stockton, San Jose and Santa Clara than to San Francisco. No application has ever been made to violate the Fourth Section by charging higher rates to Sacramento and the other three cities than were charged to San Francisco, no hearing has ever been had, no evidence has ever been introduced. Therefore the section is mandatory that the four cities complaining shall not be charged higher rates than San Francisco.

Application and Hearing Necessary to Validity of Orders.

The necessity for an application and a hearing under the Fourth Section, and the features which distinguish this section from sections 2 and 3, are clearly outlined in the above mentioned case of

United States v. Louisville & N. R. Co., 235 U. S. 314.

We quote from the above case, beginning on page 321:

> "While these conclusions demonstrate the error in the action of the court below, that result does not authorize us to reverse and give effect to the order of the Commission without going further, *since it must be determined whether the action of the Commission was repugnant to the Constitution, in excess of the powers which that body possessed, or, what is equivalent thereto, was wholly unsustained by proof,*—questions which the court below failed to pass upon because of the erroneous conception in which it indulged concerning its own powers. But if it were essential for us to consider these questions, we should be con-

fronted with a grave situation arising from the serious doubt which would exist whether it would be possible for us to do so in view of the manner in which the Commission had discharged its functions, *and whether that method had not, in and of itself, amounted to a denial of a hearing and thus resulted in want of due process of law.* See Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 91, and the paragraph from the answer of the Commission, filed in the court below, which is in the margin.

"We pass this subject by, however, because its consideration is not essential to determine whether the Commission was right in prohibiting a continuance of the rebilling privilege, since we are of the opinion that even if the allowance of such rebilling privilege when originally made was authorized by the statute, and was therefore not a preference, *the right to continue it had been expressly prohibited by statute until, on application made to the Commission, its consent to that end was given.* The express or implied statutory recognition of the authority on the part of carriers to primarily determine for themselves the existence of substantially similar circumstances and conditions as a basis of charging a higher rate for a shorter than for a longer distance within the purview of the 4th section of the act to regulate commerce, and the right to make a rate accordingly, to continue in force until, on complaint, it was corrected in the manner pointed out by statute, ceased to exist after the adoption of the amendment to § 4 (24 Stat. at L. 380, chap. 104) by the act of June 18, 1910, chapter 309, 36 Stat. at L. 547, Comp. Stat. 1913, § 8566. This results from the fact that by the amendment in question the original power to determine the existence of the conditions justifying the greater charge for a shorter than was exacted for a

longer distance was taken from the carriers and primarily vested in the Interstate Commerce Commission, and for the purpose of making the prohibitions efficacious *it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted.* Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.), 234 U. S. 476. If, then, it be that the rebilling privilege which is here in question, disregarding immaterial considerations of form, and looking at the substance of things, was, when originally established, an exertion of the authority conferred or recognized by the 4th section of the act, *as there is no pretense that permission for its continuance had been applied for as required by the amendment, and the statutory period for which it could be lawfully continued without such permission had expired, it follows that its continued operation was manifestly unlawful,* and error was committed in permitting its continuance under the shelter of the injunction awarded by the court below." (Italics ours.)

It will be noted that the answer of the Interstate Commerce Commission, referred to in the foregoing case and set forth in the margin thereof, is practically identical with the contention of appellants herein. Appellants claim, as did the Commission in the other case, that the Interstate Commerce Commission, in arriving at its decisions and orders of January 29, 1915, and April 30, 1915, weighed and considered all the facts and arguments presented; that in forming its opinion and arriving at its conclusions it exercised its administrative functions and powers, considered all pertinent facts

and matters set forth in many reports and statistics on file, together with other facts coming to its knowledge in performance of its duties and functions prescribed pertaining to the matter involved; also the question of water competition at various points. A reference to the decision of the Supreme Court as to such an answer is sufficient, without further argument. (See Answer of Commission, Trans. bot. p. 82.)

Appellants have further argued that the carriers, by filing tariffs with the Commission, complied with the provisions of the Fourth Section. The tariffs complained of in this case were filed on less than the statutory notice of thirty days, and without compliance with the other requirements of section 6 of the Act to Regulate Commerce. Further, such tariffs were filed—not as voluntary acts on the part of the carriers, but—under previous orders of the Commission. It is these *orders* regarding which we complain. Appellants likewise claim a waiver on the part of the carriers, forgetting, however, that the Fourth Section is mandatory and that public interests and constitutional rights are involved which cannot be taken away without due process of law. All violations of the long and short haul clause are prohibited, except as allowed after due and legal proceedings to that end. Consent of the carriers is no excuse for the violation of Acts of Congress and no reason for depriving parties of property without due process of law, contrary to the Constitution of the United States.

Powers of Federal Courts to Set Aside Orders of Commission.

As to the powers and duties of the courts of the United States with respect to orders of the Interstate Commerce Commission, we can perhaps best state the same by quoting from the case of

I. C. C. v. Louisville & Nashville R. R. Co., 227 U. S. 88.

"On the appeal here, the government insisted that while the act of 1887 to regulate commerce * * * made the orders of the Commission only prima facie correct, a different result followed from the provision in the Hepburn act of 1906, * * * that rates should be set aside if after a hearing the 'Commission shall be of the opinion that the charge was unreasonable'. In such case it insisted that the order based on such opinion is conclusive, and (though Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 547, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.

"1. *But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government.* It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice,

and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized *that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'* (Citations) *or if the facts found do not, as a matter of law, support the order made* (Citations).

"2. The government's claim is not only opposed to the ruling in Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 547, and the cases there cited, but is contrary to the terms of the act to regulate commerce, which in its present form provides * * * for methods of procedure before the Commission that 'conduce to justice.' The statute, instead of making its orders conclusive against a direct attack, expressly declares that they may 'be suspended or set aside by a court of competent jurisdiction.' * * * Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law,—are all matters within the scope of judicial power.

"3. Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order. Interstate Commerce Commission v. Northern P. R. Co., 216 U. S. 544. In a case

like the present the courts will not review the Commission's conclusions of fact (Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U. S. 251) by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question of law. *A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be 'set aside by a court of competent jurisdiction.'* * * *

"4. The government further insists that the commerce act * * * requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created; and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of § 12 may be used as a basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Interstate Commerce Commission v. Baird, 194 U. S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the

> Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding. United States v. Baltimore &c. R. R., 226 U. S. 14." (Italics ours.)

In the case of

I. C. C. v. Union Pac. R. R. Co., 222 U. S. 541,

the decision very clearly sets forth the powers and duties of the courts. We quote from page 547:

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved

> has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

The case of

Ex parte Young, 209 U. S. 123,

sustains our contention that an injunction should issue under the showing which we have made that petitioners have been denied the equal protection of the law and that there is a confiscation of their property. As is stated at the bottom of page 148 of said decision, *various affidavits* were received upon the hearing before the court prior to the granting of the temporary injunction. We respectfully call the court's attention to the following cases which sustain our contention that under the facts presented the court has the right of judicial review.

See

Southern Pac. Co. v. I. C. C., 219 U. S. 433;

U. S. v. Baltimore & O. R. R. Co., 226 U. S. 14, 20;

State of Washington ex rel. O. R. & N. Co. v. Fairchild, 224 U. S. 510.

In the case of

Missouri, K. & T. R. Co. v. I. C. C., 164 Fed. 645,

the powers and duties of courts with regard to orders of the Interstate Commerce Commission are quite fully set forth. We will quote from pages 648 and 649:

"Power to determine and prescribe what are just and reasonable maximum rates to be charged in interstate commerce is, in a limited way, conferred upon the Interstate Commerce Commission by existing statute law; but as the Commission acts only as a legislative or administrative board, and not judicially, its determination or actions does not, and cannot, preclude judicial inquiry into the justness and reasonableness of the rates, within the meaning of the constitutional guaranty, for that is a judicial question.

" * * * The statute under which the Interstate Commerce Commission derives its power to prescribe rates at all unequivocally recognizes, and, if there be need therefor, it plainly declares that the circuit courts, sitting in equity, are vested with jurisdiction to entertain, hear, and determine suits to compel obedience to the orders of the Commission prescribing rates (and also suits to annul or enjoin the enforcement of such orders. * * *

"It is not intended that the hearing in such a suit, whether it be of one kind or the other, shall be confined to an ascertainment of what was determined by the Commission and to a consideration of the sufficiency of the facts as determined by it to sustain the order; but on the contrary, *the hearing may be de novo, and may include the taking and consideration of evidence other than that before the Commission.*" (Italics ours.)

We claim that the order of the Commission increased freight rates to the four complaining cities —something neither applied for nor justified by the evidence. The case of

Texas & Pac. R. Co. v. I. C. C., 162 U. S. 197,

was an action to compel the rail carriers to obey

an order of the Interstate Commerce Commission. An objection was raised to the order of the Commission on the ground that the Commission had authority only to inquire into matters pursuant to complaints made. In that connection the court said, beginning at the bottom of page 215:

> "We do not wish to be understood as implying that it would be competent for the Commission, without a complaint made before it, and without a hearing, to subject common carriers to penalties. It is also obvious that if the Commission does have the power, of its own motion, to promulgate general decrees or orders which thereby become rules of action to common carriers, such exercise of power must be confined to the obvious purposes and directions of the statute. Congress has not seen fit to grant legislative powers to the Commission."

On page 222 the court further says:

> "The effort of the Commission, by a rigid general order, to deprive the inland consumers of the advantage of through rates, and to thus give an advantage to the traders and manufacturers of the large seaboard cities, seems to create the very mischief which it was one of the objects of the Act to remedy."

After reviewing the various decisions, the court, beginning on page 233, says:

> "The conclusions that we draw from the history and language of the act, and from the decisions of our own and the English courts, are mainly these: That the purpose of the act is to promote and facilitate commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or dis-

criminations. That, in passing upon questions arising under the act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, and in considering whether any particular locality is subjected to an undue preference or disadavantage the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered. That if the Commission, instead of confining its action to redressing, on complaint made by some particular person, firm, corporation, or locality, some specific disregard by common carriers of provisions of the act, proposes to promulgate general orders which thereby become rules of action to the carrying companies, the spirit and letter of the act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country.

"It may be said that it would be impossible for the Commission to frame a general order if it were necessary to enter upon so wide a field of investigation, and if all interests that are liable to be affected were to be considered. This criticism, if well founded, would go to show that such orders are instances of general legislation, requiring an exercise of the law-making power, and that the general orders made by the Commission in March, 1889, and January, 1891, instead of being regulations calculated to promote commerce and enforce the express provisions of the act, are *themselves laws of wide import,* destroying some *branches of commerce that have long existed,* and *undertaking to change the laws and customs of transportation in the promotion of what is supposed to be public policy.*

"This is manifest from the facts furnished us in the report and findings of the Commission, attached as an exhibit to the bill filed in the circuit court." (Italics ours.)

In Philadelphia & R. Ry. Co. v. United States, 240 U. S. 334,

the Supreme Court reversed the decree of the lower court in dismissing the original bill by the carrier to secure an annulment of an order of the Interstate Commerce Commission. The carrier contended on appeal that when considered in connection with its report, the Commission's order was plainly erroneous as a matter of law because wholly unsupported by the ascertained facts. The carrier contended that under the order of the Commission it would be unable to compete for business; a point which we have raised in this case. After reviewing the evidence the Supreme Court said:

> "As the facts reported afford no foundation for the Commission's findings, enforcement of the order based thereon must be enjoined."

As to limitations on the powers of a state to exercise authority to regulate the rates to be charged by rail carriers, see

> Northern Pac. Ry. Co. v. North Dakota Ex. Rel. McCue, 236 U. S. 585;
>
> Norfolk & W. Ry. Co. v. Conley, 236 U. S. 605.

The two foregoing cases are illustrative of the principle that the courts will review the evidence presented and will determine whether, as a matter of law, the facts found were sufficient to warrant the finding of the Commission or to prove the reasonableness of an act of the Legislature, and unless reason is shown for the action of the Commission or of the Legislature, it must be concluded that they acted in excess of their power.

> In Louisville & N. R. Co. v. Finn, 235 U. S. 601,

at page 606, the court says:

> "To deal first with the rate order. In cases arising under the interstate commerce act, the provisions of which contemplate an investigation or inquiry conducted with some formality, followed by a written report and decision as the basis of the orders, *it has been repeatedly held by this court that an administrative order made indisputably contrary to the evidence, or without any evidence, must be deemed to be arbitrary, and therefore subject to be set aside.* I. C. C. v. Union P. R. Co., 222 U. S. 541;

I. C. C. v. Louisville & N. R. Co., 227 U. S. 88. It is contended that the 'due process' provision of the 14th Amendment imposes a like rule of procedure upon the states with respect to their exercise of the legislative power of rate-making." (Italics ours.)

In Florida East Coast Ry. Co. v. United States, 234 U. S. 167,

the Supreme Court reversed the decree of the Commerce Court for not enjoining an order of the Interstate Commerce Commission. The court reviewed the evidence and said, beginning on page 185:

"While a finding of fact made by the Commission concerning a matter within the scope of the authority delegated to it is binding, and may not be re-examined in the courts, *it is undoubted that where it is contended that an order whose enforcement is resisted was rendered without any evidence whatever to support it, the consideration of such a question involves not an issue of fact, but one of law, which it is the duty of the courts to examine and decide.* Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 91, 92, and cases cited.

"In view of what we have said concerning the state of the record, the solution of the question must depend upon an examination and analysis of two subjects: the one, the reports of the Commission in the previous cases, and the other, the testimony which was before it and the report made in this case. As to the first, in view of the statements made by the Commission in its report in the original case (No. 1168, 14 Inters. Com. Rep. 476) as to the earning power of the road, the nature of its busi-

ness, and the reasonableness of its rates, and the express finding that the citrus fruit and vegetable rates were just and reasonable and should not be changed, and the further fact that they were not called in question in the second proceeding, it *follows that the inquiry narrows itself to the mere consideration of the testimony taken in this proceeding, and the report of the Commission in such proceeding, and the testimony taken before the court below* in so far as it is proper to consider it in connection with the particular question under consideration. But, coming to make a review of the testimony before the Commission on the issue raised by the second supplemental petition, we fail to find the slightest proof tending to sustain the reduction in rates as to the East Coast Line, which was made." (Italics ours.)

In United States v. Louisiana & P. Ry. Co., 234 U. S. 1,

involving "tap lines", the Commerce Court set aside an order of the Commission and its decree was affirmed by the Supreme Court. On page 28 this court, referring to the order of the Commission says:

"This order would of itself create a discrimination against proprietary owners, for lumber products are carried from this territory upon blanket rates applicable to all within its limits. * * * The Commission, by the effect of its order, recognizes that railroads organized and operated as these tap lines are, if owned by others than those who own the timber and mills, would be entitled to be treated as common carriers and to participate in joint rates with other carriers. We think the Commission exceeded its authority when it condemned these

roads as a mere attempt to evade the law and to secure rebates and preferences for themselves."

As further explaining the distinction between a case where a party has the right to apply directly to the courts for relief and a case in which the jurisdiction is vested in the Interstate Commerce Commission, we refer to the case of

Pennsylvania R. Co. v. International Coal Min. Co., 230 U. S. 184.

In this matter the rail carrier was sued direct for reparation. On the appeal it contended that the question of rates could be decided only by the Interstate Commerce Commission. Referring to the principles involved this court, especially on *page 196* of the report, said that the determination of the reasonableness or justness of rates involves a comparison of rate with service and calls for an exercise of the discretion of the administrative and rate-regulating body. That so far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions had been conferred upon the courts; but, however, many cases arise in which those considerations do not appear and even if differences can be made in rates, none can be made except in the manner prescribed by statute.

Where an application has been made to the Interstate Commerce Commission for certain relief, the necessary evidence to justify the order of the Interstate Commerce Commission must be taken

before the Commission, otherwise the order must be set aside by the courts. The case of

Washington ex rel. O. R. & N. Co. v. Fairchild, 224 U. S. 510,

arose because the Attorney General of the State of Washington, at the direction of the Railroad Commission of that state, filed a complaint against the O. R. & N. Company to compel that common carrier to provide additional trackage and sidings. The Commission made such an order which was thereafter attacked. The order was set aside by the courts of Washington, and the judgment of said courts was affirmed by the Supreme Court of the United States. The purport of the above decision is that when a complaint is made to the Commission, sufficient evidence must be introduced before the Commission to justify its order, and if there is a failure of evidence, the order must be set aside. The court also says that the fact that the carriers did not produce their records before the Commission would not sustain the validity of the order. The principle of the law laid down is that the Commission cannot act except upon a complaint and that its order must be sustained by substantial evidence, irrespective of whether or not the carriers or others failed to appear and put in evidence even though they had the opportunity so to do.

The foregoing case was approved in

United States v. Baltimore & O. S. W. R. Co., 226 U. S. 14.

On page 20 of the last mentioned decision, the court says:

> "It is unnecessary to consider objections to the conclusion of the Commission that it was safe and reasonably practicable, etc., to establish the switch. We remark that *it is stated in the Commissioner's report that they based their conclusion more largely upon their own investigation than upon the testimony of the witnesses. It would be a very strong proposition to say that the parties were bound in the higher courts by a finding based upon specific investigations made in the case without notice to them.* (Citing Washington ex rel. O. R. & N. Co. v. Fairchild, 224 U. S. 510, 525.) Such an investigation is quite different from a view by a jury, taken with notice and subject to the order of a court, and different again from the question of the right of the Commission to take notice of results reached by it in other cases, when its doing so is made to appear in the record, and the facts thus noticed are specified, so that matters of law are saved." (Italics ours.)

COMMISSION CANNOT MAKE RATES.

The orders of the Commission herein complained of arbitrarily increased the freight rates to the four cities herein involved, both as to Schedule "B" and Schedule "C" commodities. As to Schedule "B" commodities, as shown by the application of the carriers and the report of the Commission, no relief was asked, no evidence was taken, and the subject was not considered. As to Schedule "C" commodities, the application was for a modifica-

tion of Fourth Section Order No. 124 and requested a greater degree of relief as to *Intermountain points* than had theretofore been granted. The effect of the orders of the Commission, and shown specifically by the tariffs filed pursuant thereto, actually *increased the freight rates to Sacramento and the other three cities as to both Schedule "B" and Schedule "C" commodities.*

Under the provisions of the amended fourth section, Sacramento and the other three cities could not be charged a higher rate than San Francisco. The Commission, however, without an application and without evidence, directed the carriers to violate the long and short haul provision of the fourth section, thus arbitrarily increasing and fixing the rate which the carriers were to charge to the four complaining cities. In

Cincinnati N. O. & P. T. Ry. Co. v. I. C. C., 162 U. S. 184,

the above question is considered. We quote from the decision beginning at the lower end of page 196:

> "Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below and is discussed in the briefs of counsel.
>
> "We do not find any provision of the act that expressly or by necessary implication confers such a power.
>
> "It is argued on behalf of the Commission that the power to pass upon the reasonableness of existing rates implies a right to prescribe rates. This is not necessarily so. The reasonableness of the rate, in a given case, depends

on the facts, and the function of the Commission is to consider these facts and give them their proper weight. If the Commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the Commission to be reasonable.

"We prefer to adopt the view expressed by the late Justice Jackson, when circuit judge, in the case of *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. Rep. 37, 3 Inters. Com. Rep. 92, and whose judgment was affirmed by this court, 145 U. S. 263 (36:699), Inters. Com. Rep. 92:

'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.'"

A further exposition of the power of the Commission in this regard is set forth in

Farmers' Loan & Trust Co. v. N. P. Ry. Co., 83 Fed. 249.

Beginning on page 255 of the above decision, after quoting from the decision in 162 U. S. above mentioned, the court says:

"And not only has the Commission no power to fix maximum rates, neither has it any power to fix minimum, relative, or any rates. 'The Commission has no power to make rates, and especially has the Commission no power to order that rates from a given point to one city shall bear a certain relation to the rates from the same point to another city.' Ninth headnote, approved by the judge, Interstate Commerce Commission v. Louisville & N. R. Co., 73 Fed. 409, 410, 428, 429. In Interstate Commerce Commission v. Northeastern R. Co., 74 Fed. 70, 73, the court, after citing the Social Circle Case, says: 'The court can only enforce the lawful orders of the Commission. As has been seen, the Commission is not warranted by the Act of Congress to fix rates, and to this extent its order is not lawful. The bill (to enforce the orders of the Commission) is dismissed.' To the same effect is Interstate Commerce Commission v. Alabama Midland Ry. Co., 21 C. C. A. 51, 74 Fed. 715, affirming 69 Fed. 227. In Interstate Commerce Commission v. Lehigh Val. R. Co., 74 Fed. 784, 788, the court, after quoting with approval Justice Jackson's views adopted by the Supreme Court, says: 'These views of the Supreme Court decisively show that the Interstate Commerce Commission is not clothed with the power to fix rates which it undertook to exercise in this case. The petition of the Interstate Commerce Commission must be dismissed.' This was a sort of percentage case. The first headnote reads: 'The fact that the cost of carriage of all coal upon an entire railroad system, from all points of shipment to all destinations, is a certain per cent. of the gross receipts from all coal, is no reason for concluding that upon a particular line or part of the system the cost of carriage

bears the same ratio to the coal receipts of that particular line or part.'

"It follows from these decisions that the Interstate Commerce Commission cannot fix any rate absolutely or relatively, directly or indirectly, by a percentage on some other rate or otherwise, but must content itself with pronouncing a rate unjust or unreasonable, leaving the carrier to readjust its rates as often as required so to do. In the case at bar, if it were not for competition found, and found controlling, the Commission could have directed the respondents to cease charging a greater rate to Spokane than they might charge to the Pacific terminals on any kind of merchandise, but it should not have attempted to fix any rate, either absolutely or by reference to any other; for, as counsel for the petitioners suggests, 'that is certain which can be made certain,' and the Commission is not empowered to fix any certain rate. We think these cases a sufficient answer to the contentions of counsel for the petitioners under this head."

The foregoing principles have been approved by the Supreme Court in the following cases. See

I. C. C. v. Cincinnati, N. O. & T. P. Ry Co., 167 U. S. 493, 500, 508, 509, 510, 511.

The case last cited concludes as follows, on page 511:

"Our conclusion, then, is that Congress has not conferred upon the Commission the legislative power of prescribing rates either maximum or minimum or absolute."

See also I. C. C. v. Alabama Midland R. Co., 168 U. S. 144, 162.

We submit that the orders of the Interstate Commerce Commission herein complained of, do, in fact, fix rates and prescribe a maximum and a minimum as to the four complaining cities, contrary to the Act to regulate commerce.

BLANKET RATES IN EAST ALLOWED—PURPOSE THEREOF.

Attention is called to the position taken by the Commission in its findings of January 29, 1915, upon which its order of the same date was based, regarding the blanketing of rates to the Pacific Coast from all points from the Missouri River to the Atlantic seaboard, a strip of territory some fifteen hundred miles wide. What the Commission said in its decision is so pertinent to the present case that we will quote at length:

> "We will next consider the allegation of the carriers that the low rates necessitated from Atlantic seaboard territory to the Pacific Coast can not be exceeded from Pittsburgh, Chicago, or the Missouri River territories, (1) because these territories are intermediate, (2) because traffic will not move therefrom to the Pacific Coast except on rates approximately equal to the rates made from the Atlantic seaboard. That provision of the fourth section of the Act which permits the carriers by application to seek relief from its requirements presupposes a condition that will lead the carriers to seek such relief. No such condition here

exists. *The carriers are not asking authority to make lower rates from the Atlantic seaboard than from intermediate points,* for the very obvious reason that were the rates so adjusted the Pacific Coast would soon be supplying itself from the Atlantic seaboard with many of the articles which are at present shipped from the interior territory. *By maintaining higher rates from the intermediate territory than from the Atlantic seaboard the railroads would concentrate a large part of the business on the Atlantic seaboard in territory contiguous to the sea. The carriers have therefore asked for no such relief.* Can it be said that their rates should be so made, and that they should be asking for such authority? What interest would be served by lower rates from the eastern seaboard to the Pacific Coast than from Chicago? Clearly not the carriers' interests. Any such adjustment of rates would be altogether adverse to the interests of the carriers and would almost inevitably result in their hauling much freight from the seaboard to the Pacific Coast which they now haul from intermediate points such as Chicago, a shorter distance, at a less expense. *The same policy would result also in serious injury to many of the industries located at interior points which have, under equal rates, built up a large and profitable business on the Pacific Coast.* Many articles are produced and manufactured both in the interior and on the Atlantic seaboard. Only a certain quantity of these manufactured articles can at present be consumed on the Pacific Coast. Any rate adjustment that tends to stimulate the movement of these articles from the Atlantic seaboard will to the same extent decrease the movement from Chicago and other intermediate points. The principal beneficiaries of such an adjustment of rates

would be the shippers on or near the Atlantic seaboard to whom would be given a monopoly of many articles in the markets of the Pacific Coast. *It is clear that the carriers' interest, and the interests of the major part of the public served, lie in the direction of the maintenance of rates from the intermediate points no higher than from the Atlantic Coast. The intent of the fourth section and the aim of the Commission in enforcing its provisions is to reduce discriminations, not to augment them. Discrimination of vast importance against intermediate points of origin would be created by the establishment of lower rates from the Atlantic seaboard to the Pacific Coast than from intermediate points."* (See Trans. pp. 282, 283. Italics ours).

This blanketing of rates was allowed by the Commission to prevent the confiscation of flourishing industries which had been built up in the territory between the Missouri River and the Atlantic Coast and to prevent a monopoly, at or near the Atlantic seaboard, of commodities produced and shipped to the Pacific Coast. *Market competition* was recognized and sustained as a controlling factor.

The situation on the Pacific Coast is the same as that on the Atlantic, and the increase of rates to the four cities complaining herein is a confiscation of their industries which have been built up under long established equal rates. The orders of the Commission, in fact, augment discrimination. While we have no objection to blanketing the rates in the East, we claim that the Commission should not impose unjust rates upon us contrary to the views

which it has expressed. *The issue is that points of destination should be as much considered as points of origin.* In Texas & P. Ry. Co. v. I. C. C., 162 U. S. 197, this court says:

> " * * * And in considering whether any particular locality is subjected to an undue preference or disadvantage, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment."

LAST PARAGRAPH OF FOURTH SECTION PROHIBITS INCREASE OF RATES TO FOUR COMPLAINING CITIES.

The Interstate Commerce Commission, in the Intermountain Cases, recognized the fact of water competition at the various California Terminals, including Sacramento, Stockton, San Jose and Santa Clara. The fourth section of the Act, as amended, contains this provision:

> "Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to and from competitive points, it shall not be permitted to increase such rates unless *after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition."* (Italics ours).

The above provision of the Act contemplates a *hearing* and the necessity of a finding that changed

conditions other than the elimination of water competition exist. It is shown by our petition as amended and by our affidavits that the rail carriers extended terminal rates to Sacramento, Stockton, San Jose and Santa Clara by reason of water competition and have from time to time lowered such rates by reason of such water competition, the lowering of such rates having continued to take piace since June 18, 1910.

The only point made by appellants is that the water carriers plying between the Atlantic and Pacific seacoast now quote dock to dock rates, having discontinued the absorption of the local haul by barge, bay craft, river boats and the like so as not to bring themselves under the jurisdiction of the Interstate Commerce Commission. These water carriers, however, did very materially lower their rates, and water competition, in fact, now exists at the four cities—Sacramento, Stockton, San Jose and Santa Clara—in a more marked degree than it did before. San Jose and Santa Clara, for instance, by barge or bay craft and motor truck can land goods in San Jose, Santa Clara and the surrounding communities at $1.00 per ton, delivered direct to the door of the consumer. This is as cheap as delivery can be made from the dock in San Francisco to the warehouse of the manufacturer or jobber. The same situation prevails at Sacramento and Stockton. These four cities are within the zone of water influence as much now as they ever were. Counsel for appellants have argued strenuously that zones

were proper and that the Commission should designate zones where the same competitive influences were felt. The four cities involved herein are in the same zone of influence as San Francisco and Oakland and are entitled to the same consideration.

It must be remembered that Sacramento, Stockton, San Jose and Santa Clara can be reached from San Francisco by an all water route and without recourse to rail transportation. In early days, as we have shown in our affidavits, ocean going vessels actually transported goods from the Atlantic seaboard direct to these cities. Later, the method of water transportation was for the ocean carriers from the East to trans-ship commodities by bay or river boats to the points of destination and this method has been in vogue for many years. The local water rates from San Francisco to all of the four cities are much lower than the respective rail rates. In fact, the local water rate to San Jose is very little more than the transfer by boat from San Francisco across to Oakland, with the additional benefit to San Jose of not being forced to pay an extra drayage charge.

If a city can receive commodities from the East by an all water route, it is in a different situation from an interior city which can only receive goods by rail. It is the low water rate which forces the decrease in rates on the part of the rail carriers. If the local back haul from San Francisco must be by rail, such carriers naturally receive a benefit

from such traffic, but if the goods are shipped by an all water route, the rail carriers derive no benefit therefrom. These points, we claim, emphasize the idea of the zone of water competition to which we have before referred and which includes the four complaining cities.

It is the unit of charge by water which forces the rail carriers to extend terminal rates to various points and the circumstances and conditions surrounding all four complaining cities are the same as surround San Francisco and Oakland. All four cities are within a zone of water influence which acts upon one practically the same as it acts upon all others. We therefore claim that there have been no changed conditions.

The fourth section of the Act provides that there must be changed conditions other than the elimination of water competition. We submit that there are no changed conditions, but even if the discontinuance of the absorption of the local back haul by the water carriers was an elimination of water competition, there are no changed conditions other than such elimination. Appellants refer to the Panama Canal as a changed condition. The opening of the Canal could have resulted in no more than increasing water competition, not the changing of conditions or the eliminating such competition. We might refer to the present physical condition of the Canal, and to the war, the well known effects of which are within the common knowledge of all.

They are matters outside of the record, yet even though they might be considered, the only effect they could have would be as to the degree of water competition.

Appellants have contended that the amendment to the fourth section of June 18, 1910, referred only to reductions in rates subsequent to that date. This argument is erroneous for two reasons, first—because the rail carriers have made reductions since June 18, 1910, because of water competition, and, second—that such a narrow construction of the Act would destroy its purpose. The amendment referred to was inserted in the statute to show the policy of Congress, to-wit, that various communities and industries built up under rates granted them by the rail carriers because of water competition, acquired certain inchoate rights which public policy would not allow the rail carriers thereafter to destroy.

Water competition does not spring up over night; it is of gradual development and must grow and continue before it can have the effect of reducing rates by rail. It cannot be said that Congress meant that if a reduction took place one day prior to June 18, 1910, the amendment would not apply, whereas if the reduction was one day later the statute would be operative. The settled principle as to the construction of statutes is that an amendment is to be construed as though it had been incorporated in the original Act and as a part thereof; the provisions of both are to be harmonized and if

possible, no clause of either is to be left inoperative. The old law must be considered, the mischiefs, inconveniences or hardships produced by it; and then the remedy proposed by the amendatory law. As we have shown, the carriers, since June 18, 1910, continued the former rates to the four cities involved which was in effect a renewal of the decreases in rates, but in addition to that they also further decreased said rates by reason of water competition, as will be shown by some seventy-five to one hundred tariffs and supplements filed since that date. These facts bring the carriers directly within the purview of the amendment.

Further, the amended fourth section has not been complied with. *The amendment contemplates an application by the carriers for an increase of the rates and a hearing by the Commission.* In the absence of such an application and hearing, any increase in rates ordered by the Commission would be an arbitrary exercise of a rate-making power. The purpose of said amendment was to protect communities and such an exercise of power by the Commission would be to deprive such communities of property without due process of law. No application filed by the carriers involved in this matter, in fact, no application by anyone at any time, ever asked permission to increase the rates to Sacramento, Stockton, San Jose and Santa Clara. We submit that the orders of the Commission increasing such rates were prohibited by the direct provisions of the amended fourth section.

Effect of Decision of District Court.

Appellants have an erroneous conception of the issue in the case at bar. Our sole contention is that the orders of the Interstate Commerce Commission of January 29, 1915, and April 30, 1915, were beyond its statutory authority for the reasons we have hereinbefore stated. This action is not brought under sections 2 or 3 of the Act regarding reasonableness of rates, nor preferences, nor discriminations, but under the fourth section which prescribes and limits the powers of the Commission.

Appellants argue that the decision of the District Court is, in effect, that applications to the Commission for relief must be granted *in toto* or denied *in toto*. Such is not the effect of the decision; it merely enjoins the enforcement of the order in so far as it was given without authority. The rail carriers applied to the Commission for permission to continue charging the same rates to Intermountain points which they had charged prior to the amendment of June 18, 1910. We do not dispute the authority of the Commission to say to the carriers that the relief requested was too great and that anything in excess of some lesser relief would not be justified. That is what the Commission actually did by Fourth Section Order No. 124 wherein it granted the carriers a part of the relief as to Intermountain points as prayed for.

No relief was asked regarding terminal points and such a matter was not considered. The rail car-

riers, by their applications and tariffs, plainly said that no relief was asked as to Sacramento, Stockton, San Jose and Santa Clara and no relief was granted. Subsequently, without an application therefor, or hearing, or evidence, the Commission ordered the carriers to increase the rates to the four cities involved, contrary to the provisions of the amended fourth section. As to the balance of the order we have no concern, but in so far as the order was beyond the statutory authority of the Commission it should be set aside. This cancellation, in part, of the orders of the Commission could work no hardship, or increase, or cause any discrimination, as to any intermediate points in California. All intermediate points pay in addition to the terminal rate the local back haul from the nearest terminal. The rates to intermediate points cannot be increased nor can discrimination result. As to Nevada points, as we have before shown, the rates thereto from San Francisco are no higher than the rates from the four complaining cities, so that the situation as to Nevada or intermountain territory could not be affected. Furthermore, the rates charged to Nevada points can exceed the terminal rate only to the extent of the percentages named in the order, and this excess is much less than the local back-haul charge from either San Francisco or Sacramento. Therefore the decision of the District Court could not possibly affect the rate situation as to Nevada points.

Appellants contend that the rail carriers must charge the rates contained in their tariffs. Such a contention would mean that no matter how illegal an order of the Commission might be and no matter how unjust might be a tariff ordered to be filed by the Commission, shippers could secure no relief from the courts because of the fact of a tariff being on file. Such contention would give the Commission a power not possessed by any department of this government. The amended fourth section prohibits a violation of the long-and-short-haul clause, and tariffs violating this section are, on their face, illegal. The argument of appellants is that a tariff having been filed, the rail carriers must collect the rates mentioned therein even though the tariff, on its face, shows that it is without sanction of law or justice.

No chaos can result from the decree of the District Court for the only thing necessary to be done is for the carriers to obey such decree and apply the San Francisco rate to the four cities mentioned. The original petition in this cause was filed before the effective date of the tariffs and due notice was given to all parties concerned of the contentions of the respondents herein. If we have no right of action such as the statute says we have, then the Commission can make any arbitrary order which it may desire, refuse to consider any protest as it did in this case, and then say to us that we have no relief.

It is immaterial in this case whether or not we had notice of the application filed by the carriers

for additional relief under Fourth Section Order No. 124, for such application did not ask for any violation of the amended fourth section as to the four cities involved. The hearing of that matter was had in Chicago on October 6, 1914, and was concluded before any matters involving San Jose were determined by the Commission. In ordinary cases the statute provides that the carriers shall file and post their tariffs and give thirty days' notice before they can become effective. (See section 6 of the Act to Regulate Commerce.) The tariffs complained of herein were filed under order of the Commission without the posting and notices as prescribed. Following this, our protests and demands were ignored; we were therefore forced to institute an action in the District Court for we had been denied the right to a hearing by the Commission.

CONCLUSION.

We again state that appellants have misconceived the purpose of the present action and the effect of the decision of the District Court.

Petitioners below, respondents herein, under the right given them by Acts of Congress, filed their petition to set aside and enjoin, in part, the orders of the Interstate Commerce Commission. The grounds upon which this petition was based were:

(1) Lack of statutory authority on the part of the Commission to make the orders. The particulars wherein this lack of power is shown are:

(a) No application, no hearing, no evidence.

(b) The orders were contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States, being without due process of law.

This case arises under the amended fourth section which contains two prohibitions:

(1) The long and short haul clause shall not be violated.

(2) Rates reduced by reason of water competition shall not be increased except in the manner and under the conditions specified.

As was said in the

Intermountain Rate Cases, 234 U. S. 476, 485:

> "Power in the carrier primarily to meet competitive conditions in any point of view by charging a lesser rate for a longer than for a shorter haul has ceased to exist, because to do so, in the absence of some authority, would not only be inimical to the provision of the 4th section, but would be in conflict with the preference and discrimination clauses of the 2d and 3d sections. * * * And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body, in the exercise of a sound legal discretion, as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned, and in view of the preference and discrimination clauses of the 2d and 3d sections."

As was said by this court in

United States v. Louisville & N. R. Co., 235 U. S. 314, 326:

> "But the rule which requires that a practice which is permitted by one section should not be prohibited upon the theory that it is forbidden by another gives no support to the unwarranted assumption that that may be permitted which is devoid of all sanction, and indeed is in direct conflict with all three of the sections. * * *"

Our claim is that the orders of the Commission, although primarily void in so far as the provisions of the fourth section are violated with reference to Sacramento, Stockton, San Jose and Santa Clara, further have no sanction under either sections 2 or 3 of the Act.

We have in our petition at length, and to an extent in this brief, referred to matters arising under the 2nd and 3rd sections of the Act, this for the purpose of showing that contrary to the decision in the Intermountain Rate Cases, the Commission did not consider such matters. Again, the effect of the decision by the Commission in the Intermountain Cases was that the rates to the coast terminals were reasonable; if so, any increase in rates to the four complaining cities would be unjustified, and there has been an increase in rates to these four cities, both as to Schedule "B" and Schedule "C" commodities, but especially as to the former.

There has never been an application filed wherein it was sought to increase the rates to Sacramento and the other three cities or to impose upon them a greater charge than to San Francisco, contrary to the long and short haul clause of the fourth section. No hearing was had on this subject and no evidence taken, yet the orders of the Commission committed both of the offenses just mentioned against the four cities.

In addition to the foregoing, the increase in rates on Schedule "B" commodities was ordered by the Commission contrary to the express wording of the application of the carriers.

The original applications of the carriers were to continue the rates which existed prior to the amendment to the fourth section and had reference only to Intermountain points. In so far as Sacramento and the other three cities were concerned, no right to violate the fourth section was requested. That order become final, as far as the Commission was concerned, June 22, 1911—Fourth Section Order No. 124. Under this order the four cities herein involved retained the same rates, under the provisions of the fourth section, as did San Francisco, and no authority was granted, none having been applied for, to charge a higher rate to Sacramento or the other three cities than to San Francisco. The application of the carriers to modify this order asked for relief only as to Schedule "C" commodities with reference to Intermountain points, Schedule "A" and Schedule "B" commod-

ities not being considered. The carriers did not ask permission to charge higher rates to Sacramento or the other three cities than were charged to San Francisco. Nevertheless, the orders of the Commission directly told the carriers to charge higher rates to the four complaining cities than were imposed on traffic destined to San Francisco, and this as to Schedule "B" commodities regarding which the carriers had specifically stated they did not desire relief.

As to Schedule "C" commodities the Commission directed the carriers to make a further application. This the carriers did and the application, in effect, was that the four complaining cities should retain their old rates since the carriers gave these four cities from a 7c to 10c per hundred pound lesser rate than was charged to San Francisco, which would have covered the back haul charge. The Commission in its decision, upon which the order of April 30, 1915, was based, recognizes that the application of the carriers did not ask for an increase to the four complaining cities. Nevertheless, the Commission, without application or authority of law, directed the carriers to increase the rates to these four cities, as to Schedule "C" commodities, to the extent of seventy-five per cent of the back-haul charge.

Our rates have been increased without justification. Section 15 of the Act to Regulate Commerce, so strongly relied upon by appellants, provides as follows:

> "At any hearing involving a rate increased after January first, Nineteen Hundred and Ten, or of a rate sought to be increased after the passage of this act, *the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the common carrier.* * * *" (Italics ours.)

We protested against this increase and demanded a hearing. We met only with denials. The increase of rates is contrary to the very provisions of the Act relied upon by appellants.

We find this result—the Commission, without application, hearing, or evidence, arbitrarily increased the freight rates to Sacramento, Stockton, San Jose and Santa Clara, usurped a rate-making power whereas its province is regulation, violated the mandate of the amended fourth section, ignored the provisions of sections 2, 3 and 15, denied our protests and demands for a hearing, and now claim that the courts cannot interfere.

We submit that the decision of the District Court should be affirmed.

Dated, San Francisco,
October 7, 1916.

Respectfully submitted,

JOHN E. ALEXANDER,
Counsel for all Appellees.